



JUSTICE AS PREVENTION

Vetting Public Employees in Transitional Societies

EDITED BY

ALEXANDER MAYER-RIECKH & PABLO DE GREIFF

INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE

Advancing Transitional Justice Series

JUSTICE AS PREVENTION

ADVANCING TRANSITIONAL JUSTICE SERIES

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Vetting Public Employees in Transitional Societies

EDITED BY ALEXANDER MAYER-RIECKH AND PABLO DE GREIFF,
INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE

SOCIAL SCIENCE RESEARCH COUNCIL • NEW YORK • 2007

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Published by the Social Science Research Council

Printed in the United States of America

Distributed by the Chicago Distribution Center

Designed by Julie Fry

Cover photograph by Carmelo Bongiorno

(Photonica/Getty Images)

Library of Congress Cataloging-in-Publication Data

Justice as prevention : vetting public employees in
transitional societies / edited by Alexander Mayer-
Rieckh and Pablo de Greiff ; introduction by Roger
Duthie.

p. cm.

ISBN-13 978-0-9790772-1-0 (alk. paper)

ISBN-10 0-9790772-1-4 (alk. paper)

1. Public officers—Dismissal of. 2. Public officers—
Discipline. 3. Civil service. 4. Administrative
responsibility. 5. Human rights. 6. Crimes against
humanity. I. de Greiff, Pablo. II. Mayer-Rieckh,
Alexander.

K3442.J87 2006

342.068—dc22

2007010640

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Contributors

Federico Andreu-Guzmán is deputy secretary-general of the International Commission of Jurists (ICJ) in Geneva. He previously served as legal adviser for the Americas and Asian regions at Amnesty International in London; officer of the Special Unit on Investigation in the UN Human Rights Mission in Rwanda in Kigali; director of the International Office for Human Rights — Action on Colombia in Belgium; deputy secretary-general on Latin America at the International Federation of Human Rights; and officer of the Special Unit on Investigation in the UN/Organization of American States (OAS) Civilian Mission on Haiti. He has been a consultant for the UN High Commissioner for Human Rights and the Haitian National Commission on Truth and Justice. He teaches human rights at the Academy on Human Rights and Humanitarian Law. His publications include the two-volume *Military Jurisdiction and International Law* (ICJ, forthcoming).

Valeria Barbuto studied anthropology at the University of Buenos Aires (UBA) and holds a master's degree in cultural studies from the Institute of Advanced Social Sciences at the University of San Martín (UNSAM). She currently works for the Memory and Fight Against Impunity for State Terrorism Program at the Center for Social and Legal Studies [*Centro de Estudios Legales y Sociales* (CELS)] in Argentina. Among its more important tasks, this program brings criminal cases against those responsible for crimes of the last military dictatorship; seeks to promote a culture of human rights respect through the preservation of social memory and the provision of reparations to victims; works to declassify archives from the dictatorship period; and develops strategies for establishing democratic institutions.

Elizabeth Barrett is based at Oxford University, where she is researching a PhD on political corruption in Central and Eastern Europe (CEE). Her other recent research has focused on the role of informal networks in the privatization process in CEE and on lustration policy in the region. From 1999 to 2001, she was based in Zagreb, Croatia, as correspondent for *The Economist* and *Busi-*

ness Central Europe. Prior to that, she was editor of the *East Europe Daily Brief* at Oxford Analytica. She graduated from Oxford and London universities.

Adam Czarnota is professor of law at the University of New South Wales and co-director of the European Law Center at the same university. He is also a senior fellow in the Contemporary Europe Research Center at Melbourne University. He was previously a visiting scholar at the European University Institute, senior lecturer at Macquarie University, a fellow at the Collegium Budapest/Institute for Advanced Study, and a visiting professor in the Białystok Faculty of Law at Warsaw University. He is review editor for *Jus et Lex*, and teaches legal theory and sociology of law. He is working on a book on legal strategies for dealing with the past.

Pablo de Greiff is the director of research at the International Center for Transitional Justice in New York. Born in Colombia, he graduated from Yale University (BA) and Northwestern University (PhD). Before joining the ICTJ he was associate professor (with tenure) in the Philosophy Department at the State University of New York at Buffalo, where he taught ethics and political theory. He has published articles on transitions to democracy, democratic theory, and the relationship between morality, politics, and law. He is the editor of seven books including *Global Justice and Transnational Politics* (MIT Press, 2002), and Jürgen Habermas's *The Inclusion of the Other* (MIT Press, 1998). During 2000-2001, he was Laurance S. Rockefeller Fellow at the Center for Human Values, Princeton University, and held a concurrent fellowship from the National Endowment for the Humanities. At the ICTJ, among other projects, he directed a large-scale project on reparations, originally entitled *Repairing the Past: Compensation for Victims of Human Rights Abuse*. This work was published by Oxford University Press in March 2006 as *The Handbook of Reparations*. He is also working on a book entitled "Redeeming the Claims of Justice in Transitions to Democracy."

Roger Duthie is a research associate at the International Center for Transitional Justice. He previously worked as a researcher and writer at KPMG; a program assistant at the Carnegie Council on Ethics and International Affairs, where he edited the quarterly publication, *Human Rights Dialogue*; and an editorial assistant at Oxford University Press. He has also worked as an intern in the Best Practices Unit at the United Nations Department of Peacekeeping Operations, the Foreign Policy Association, and the United Nations Association. He has an MA in international relations from Yale University and a BA in history with a concentration in international relations from Cornell University.

Péter Hack is an associate professor at the Budapest Law Faculty and a visiting professor of the Law Faculty of Széchenyi University in Győr. Hack was elected to the Hungarian National Assembly in 1990, and served as chairman of the Committee on Constitutional, Legislative, and Judicial Affairs. He was a founding member of both the Hungarian Helsinki Committee and the Alliance of Free Democrats [*Szabad Demokraták Szövetsége*] (SZDSZ), serving as a member of the latter's executive board from 1990 to 2001. From 2000 to 2001, he was a member of the advisory board for the Open Society Institute's EU Accession Monitoring Program (EUMAP) on Corruption and Anti-corruption Policy. Since 1990 he has worked as an expert and trainer for the American National Democratic Institute for International Affairs. In January 2003 he worked as an expert for the EU-funded Policy and Legal Advice Centre in Belgrade on the program for improving legal drafting in Serbia. He earned a degree in law at the Lóránd Eötvös University in Budapest.

Jonathan Klaaren is a professor of law and the director of the Mandela Institute at the School of Law of the University of the Witwatersrand, Johannesburg. His research is in migration and citizenship, sociolegal approaches to rights and regulation, and comparative human rights and constitutional law. He has published in the *South African Journal on Human Rights* as well as other South African and international journals. Jonathan clerked for Judge A. Leon Higginbotham, Jr., of the Third Circuit US Court of Appeals. He works with WISER on the research project on law, crime, and moral logics and chairs the local organizing committee for the 2006 Law & Society Summer Institute.

Alexander Mayer-Rieckh, a human rights lawyer specializing in post-conflict institutional reform, manages the Security System Reform (SSR) Program of the International Center for Transitional Justice and heads its office in Geneva. He was chief of the Human Rights Office of the UN Mission in Bosnia and Herzegovina and worked for the United Nations in Geneva, Rwanda, Ethiopia and Eritrea, and East Timor. His publications include "The United Nations and East Timor: From Self-Determination to State-Building" (co-authored with Ian Martin, *International Peacekeeping* 12, no.1 [Spring 2005]); and "Vetting: an Operational Framework," Office of the UN High Commissioner for Human Rights (2006). Mr. Mayer-Rieckh obtained his MDiv at Weston School of Theology in Cambridge, Massachusetts, and his master's in law at the University of Vienna.

Ágnes Munkácsi is a private consultant. She previously served as a legal adviser to the parliamentary caucus of the Free Democrats in Hungary and was a

visiting partner at the SIGMA (Support for Improvement in Governance and Management in Central and Eastern European Countries) program of the Organization for Economic Co-operation and Development (OECD). She has a law degree from Lóránd Eötvös University in Budapest and an LLM certificate in comparative constitutionalism from the Central European University.

Jiri Priban is professor of law at Cardiff University and visiting professor of jurisprudence at Charles University in Prague. He is the author of *Dissidents of Law* (Ashgate, 2002) and co-editor of *Systems of Justice in Transition* (with Pauline Roberts and James Young, Ashgate, 2003), *Law's New Boundaries* (with David Nelken, Ashgate, 2001), and *The Rule of Law in Central Europe* (with James Young, Ashgate, 1999). He regularly publishes in the field of social theory of law, theory of constitutionalism and human rights, jurisprudence, and comparative European law.

Serge Rumin is an expert on institutional reform in post-conflict transition. He has undertaken various consultancies, including as an advisor to the Police Restructuring Commission in Bosnia and Herzegovina, with the EU Commission in the Middle East and North Africa, with the UK Department for International Development (DFID), with the UN Mission in the Democratic Republic of Congo (MONUC), with the UNDP in East Timor, and with the ICTJ in Afghanistan, Burundi, Haiti, Liberia. He has also assisted DPKO in drafting police reform policies. He teaches institutional reform in post-conflict transition at the Law Faculty of Aix-Marseille and Management School of Marseille. A trained information management specialist, Rumin earned a master's degree in international aid from the University of Aix-en-Provence, and a diploma in analysis of contemporary criminal threats at the University of Paris-Assas. He is a candidate for a doctorate in sociology, specializing in the study of organizations and social change in post-conflict situations.

Dimitri A. Sotiropoulos is assistant professor in the Department of Political Science and Public Administration at the University of Athens. He studied law at the University of Athens and sociology at the London School of Economics, and he obtained a PhD in Sociology from Yale University in 1991. As a political sociologist, his research interests are in the study of the state bureaucracy and political parties in Greece and in Southern Europe; the process of democratization and civil society in post-communist South-Eastern Europe; and the welfare state and public administration in South-Eastern Europe. His latest edited books are *Is Southern Europe Doomed to Instability?* (with Thanos Veremis, Frank Cass, 2002), and *The State and Democracy in the New Southern*

Europe (with Richard Gunther and P. Nikiforos Diamandouros, Oxford University Press, 2006).

Christiane Wilke is an assistant professor in the Department of Law at Carleton University, Canada. She has a PhD in political theory from the New School for Social Research in New York. Her current book project examines criminal trials for massive human rights violations and their constructions of perpetrators and victims in Argentina and Germany. She is also researching concepts of the enemy in legal and political thought.

Rubén I. Zamora is the general secretary of the political party, *Centro Democrático Unido*, in El Salvador. He has been involved in Salvadoran politics for more than thirty years, and has written extensively on democracy and democratic transitions in Central America. He holds a law degree from the University of El Salvador and a graduate degree in political science from Essex University in England. Zamora has held teaching positions at the University of El Salvador and Stanford University, and research positions at the Woodrow Wilson International Center for Scholars in Washington, DC, and the Kellogg Institute for International Studies at Notre Dame. In recent years, Zamora has consulted for the UNDP and the EU.

Acknowledgments

A multiyear project of this sort is always such that debts are acquired. The editors are happy to acknowledge, with deep gratitude, the United Nations Development Programme, which gave the ICTJ the initial grant to develop this research, and which eventually published the vetting guidelines that came as a result of the work; the United Nations Department of Peacekeeping Operations, for entering into a partnership on vetting with the ICTJ and seeking its assistance in developing post-conflict institutional reform strategies; the Office of the United Nations High Commissioner for Human Rights, for supporting our work leading to the issue on vetting in its series, Rule-of-Law Tools for Post-Conflict States; and the governments of the United Kingdom and the Netherlands, for grants that supported this research. Special thanks goes to the Swiss Ministry of Foreign Affairs, which gave us funding to support the present publication. Finally, it is our pleasure to include in the list of institutions to which we are indebted the Rockefeller Foundation, which kindly allowed us to use its conference center in Bellagio, Italy, for a remarkable meeting of authors.

In addition to institutions, many individuals deserve recognition and thanks: Gábor Halmai, Professor of Law and Executive Director of the Hungarian Human Rights Information and Documentation Center INDOK, with whom we worked closely on the production of the Eastern and Central European case studies; and Ian Martin, Paul van Zyl, Graeme Simpson, Serge Rumin, Andrea Armstrong, Elsa España, Lizzie Goodfriend, and Briony MacPhee, current and former staff members at the ICTJ. Roger Duthie deserves special mention for tireless work on this project, well beyond that involved in writing the introduction. We are of course grateful to the authors of the papers in this volume, and to Etannibi Alemika, Annika Hansen, Cynthia Horne, Javier Mariezcurrena, and the other participants at the Bellagio meeting.

Alexander Mayer-Rieckh, Geneva, Switzerland

Pablo de Greiff, New York, USA

Introduction

Roger Duthie

In countries emerging from periods of armed conflict or authoritarian rule, efforts to address the legacies of massive human rights abuses—that is, transitional justice—have taken a number of different forms. The most well-known, researched, and studied of these measures has been criminal prosecutions, particularly those carried out at the international level, such as the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.¹ Outside the realm of criminal justice, truth-telling efforts, in particular truth commissions (most famously in South Africa and Latin America), have garnered a great deal of attention and study.² Recent studies of massive reparations efforts of an administrative nature aimed at the victims of human rights abuses within countries have added to the literature on reparations, which had previously focused on reparations between states, particularly following World War II.³

Vetting is another major category of transitional justice measures that countries in transitions to peace and/or democracy frequently employ, but that has been less studied than prosecutions, truth telling, and reparations. The term “vetting” is used in this volume to refer to processes for assessing an individual’s integrity as a means of determining his or her suitability for public employment. “Integrity” is used here to refer to “a person’s adherence to relevant standards of human rights and professional conduct, including her or his financial propriety.”⁴ Thus, vetting processes are aimed at screening public employees or candidates for public employment to determine if their prior conduct (including, most importantly from a transitional justice perspective, their respect for human rights standards) warrants their exclusion from public institutions. “Exclusion” here includes both terminating employment and restricting access to employment—firing and hiring. Vetting may be thought of primarily as a form of “administrative justice” because it involves the application of administrative law, which regulates the operation of administrative agencies and their relations with other branches of governments and the public. According to Ruti Teitel, administrative justice “illuminates law’s

distinctive potential for restructuring the relation of the individual to the political community in the transition.”⁵ Vetting is also inherently an element of institutional reform, in that even the most minor of vetting efforts will lead to changes in the makeup of the personnel of a public institution.⁶

There is a lack of agreement in the literature on the definition of basic terms, such as “vetting,” “lustration,” “screening,” “administrative justice,” and “purging,” which are often used interchangeably. Jon Elster, for example, refers to “administrative justice, that is, purges in the public administration,”⁷ while Martha Minow notes that “the removal of categories of people from public office or benefits” is “sometimes called a purge, and sometimes ‘lustration.’”⁸ Kieran Williams, Brigid Fowler, and Aleks Szczerbiak define lustration as “the systematic vetting of public officials for links to the communist-era security services.”⁹ Jens Meierhenrich takes lustration to refer to “the purification of state institutions from within or without. The practice of lustration ordinarily revolves around, first, the screening of candidates for public office; second, the barring of candidates from public office; and third, the removal of holders from public office.”¹⁰ As the terms are used in this volume, purges differ from vetting in that purges target people for their membership in or affiliation with a group rather than their individual responsibility for the violation of human rights. Purges are most commonly associated with denazification in Germany and the actions taken against collaborators in France following World War II,¹¹ and, more recently, the de-Baathification process in Iraq. “Lustration” is used in this volume to refer specifically to the laws and processes that were named as such in the former communist countries of Eastern and Central Europe¹² (although some argue that lustration, depending on the country, straddled or crossed the line between vetting and purging¹³).

The term “vetting” itself has been used to describe screening processes of public employees for criteria that do not include human rights considerations, but focus instead on issues related to the security of the state, such as in South Africa and Northern Ireland.¹⁴ Nevertheless, there is an emerging concept of vetting among international actors that corresponds to the definition used here, which comes from “Vetting Public Employees in Post-Conflict Settings: Operational Guidelines,” a document produced by the ICTJ in collaboration with, and with the financial support of, the United Nations Development Programme (UNDP).¹⁵ (Similar versions of these guidelines have been published by the UNDP¹⁶ and by the Office of the UN High Commissioner for Human Rights.¹⁷) Similarly, the UN Secretary-General’s 2004 report, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, defines vetting the public service as “usually entail[ing] a formal process for the identifica-

tion and removal of individuals responsible for abuses, especially from police, prisons services, the army and the judiciary.” The report points out that the UN has been involved in such processes in Bosnia and Herzegovina, Kosovo, Timor-Leste, Liberia, and Haiti.¹⁸

The frequency with which post-conflict and post-authoritarian countries engage in vetting processes and the growing attention they are receiving from international actors reflect an awareness of the relevance of vetting in transitions. In the words of Meierhenrich, “Although lustration is just one of many institutions of *jus post bellum*, it is arguably one of the most important. The pursuit of administrative justice affects the reconstitution of the public sphere—literally and figuratively—in more fundamental ways, and thus more far-reaching ways, than most other institutions of transitional justice.”¹⁹ Given the significance of vetting, it is surprising that no comprehensive, comparative, and thematic study exists on the subject.

This volume, which is one of the end products of a multiyear research project undertaken by the International Center for Transitional Justice, aims to fill this research gap. It contains nine country-specific case studies: Argentina, El Salvador, Greece, South Africa, Bosnia and Herzegovina, Poland, Hungary, the Czech Republic, and East Germany. Four of the cases come from former communist countries of Eastern and Central Europe, and focus on the lustration and vetting laws and procedures developed there; they provide a revealing comparison of how vetting processes can differ in similar contexts. The cases of El Salvador and Bosnia and Herzegovina provide us with two examples of how vetting may play out in post-conflict societies (Bosnia and Herzegovina also representing a post-communist situation), in which international actors tend to have a more important role. Argentina, Greece, and South Africa are cases of non-communist, post-authoritarian transitions (South Africa and Argentina representing both post-authoritarian and post-conflict situations), although their differences make them difficult to group together. What is apparent from these three cases, however, is the significant role that transitional politics play in shaping and limiting the extent of vetting processes.

The project’s case studies constituted a first phase of research, which revealed that vetting is much more than a mere technical exercise in personnel reform. A second phase of the research project, therefore, aimed to address the broader, key practical, political, legal, and moral issues in order to clarify a number of fundamental conceptual questions related to vetting as a measure of transitional justice. This second phase included four thematic studies focusing on issues that cut across the case studies and frequently arise in the design and implementation of vetting programs: information gathering

and management; due process; vetting and its relationship with other institutional reforms; and vetting and transitional justice.

In practice, there is no one-size-fits-all approach to vetting; in each case, the designers of a vetting process must make a number of basic decisions concerning what they want to achieve and how they want to achieve it. In the following sections, I briefly discuss nine basic decisions, as well as how they have in fact been made in the cases in this volume. These are:

- *Targets*: What are the institutions and positions to be vetted?
- *Criteria*: What misconduct is being screened for?
- *Sanctions*: What happens to positively vetted individuals?
- *Design*: What are the type, structure, and procedures of the vetting process?
- *Scope*: How many people are screened? How many people are sanctioned?
- *Timing and Duration*: When does vetting occur and how long does it last?
- *Rationale*: How is vetting justified? What are the reasons for vetting?
- *Coherence*: How does the vetting relate to other measures of institutional reform? How does it relate to other transitional justice measures?

All of these decisions will be affected by the transitional context in which vetting occurs; I therefore conclude with some comments about such contexts. An examination of how these decisions have been approached reveals that, strictly speaking, the processes described in this volume do not always follow the same definition of vetting. Sanctions, for example, may not necessarily involve exclusion, but rather public disclosure or transfers within the public sector. The conduct being screened for may tend toward affiliation rather than abuses. Nonetheless, in every case included in this volume, the effort to reform institutions in the transition out of war or authoritarianism involved certain processes that we can describe as vetting or that function similarly to vetting. This is the case even in South Africa and Argentina, where politics blocked formal vetting as a potential avenue for the pursuit of justice.

TARGETS: WHAT ARE THE INSTITUTIONS AND POSITIONS TO BE VETTED?

Vetting refers to processes applied to the public sector within a given country. There is no case of vetting in a post-conflict or post-authoritarian transition, however, in which vetting has been applied to the entire public sector. Vetting

processes are applied only to certain institutions. Furthermore, as the “Vetting Guidelines” in this volume explain, vetting can target an entire institution, or it can target only certain positions within an institution or certain categories across institutions. The decision may depend on available resources, political considerations, or the human rights records of certain units. Whatever the case, a “clear definition of the positions subject to vetting is a prerequisite for any vetting process.”²⁰

From a human rights perspective, the most important institutions to be vetted would be those most responsible for having committed human rights violations, or for allowing them to occur, under the previous regime or during the conflict. In post-conflict situations, therefore, vetting tends to focus on those institutions implicated in serious, violent human rights abuses, primarily in the security sector and judicial sector institutions. In El Salvador, for example, following the twelve-year-long civil war, vetting processes occurred in the early 1990s in the armed forces and as part of the creation of a new civilian police force, and were accompanied by limited mechanisms to improve judicial accountability. In post-Dayton Agreement Bosnia and Herzegovina, where, according to Alexander Mayer-Rieckh, in this volume, “the police did not enforce the law impartially and the courts did not fairly render justice,” and consequently, “public confidence in the rule of law remained low,” vetting processes focused on the police and the judiciary.

In some post-authoritarian cases, where less violent misconduct such as collaboration may have implicated members of a wider range of institutions, vetting can also take on a broader range of targets, including electoral posts, universities, and the media. In the Czech Republic, for example, the lustration procedure reached a “wide range of public offices,” according to Jiri Priban in this volume, including the judiciary and prosecution office, the civil service, constitutional bodies, the army and police, intelligence services, the national bank, the state media, press agencies, state corporations, universities, and the Academy of Sciences. In Hungary, those affected have included members of parliament; ombudsmen, members of the Constitutional Court, the president and vice president of the Supreme Court, and the chief prosecutor; the public administration at the highest level, including the president and members of the cabinet; the police; and the media. Screening of the media in Hungary eventually included, according to Act No. XCIII (2000), “those who have the effect to influence the political public opinion either directly or indirectly.”²¹ In Poland, the lustration statute stated that persons holding public offices had to make lustration declarations, including the president, members of parliament, and senators; the head of the civil service; directors in ministries,

central offices, and state regional administrations; judges, procurators, and advocates; and certain members of the media.²²

Vetting in post-authoritarian countries, however, is not always applied so broadly across public institutions. In Greece, for example, explains Dimitri Sotiropoulos in this volume, “vetting has led to different outcomes in various political and administrative institutions.” There, vetting was applied to universities, the justice system, the military, and the police and gendarmerie; although the government passed specific legislation regarding only the vetting of academics and judges, the processes themselves ended up being most extensive in the universities and military. In unified Germany, explains Christiane Wilke in her chapter, vetting had a profound impact within the public sector, including universities, but it was applied unevenly at different levels of the system.²³ In post-Apartheid South Africa, which straddled the line between a post-authoritarian and post-conflict case, and in Argentina, broad decisions were made *against* vetting the public sector at all.²⁴

CRITERIA: WHAT MISCONDUCT IS BEING SCREENED FOR?

The criteria of a vetting effort are the specific types of misconduct that vetting authorities look for in an individual’s past. Each vetting process operates on the basis of certain criteria. These also vary across institutions, transitional contexts, and time. In post-communist Eastern Europe, for example, authorities often vetted for evidence of nonviolent actions that constituted violations of “public trust,” such as past collaboration with secret service institutions, while in post-conflict countries members of security institutions have been screened for violent abuses, such as war crimes, crimes against humanity, and crimes of genocide.

There should be certain minimum standards of integrity, however. According to the “Vetting Guidelines”:

As a general rule, involvement in gross violations of human rights or serious crimes under international law should always disqualify a person from public employment. These include in particular genocide, war crimes, crimes against humanity, extrajudicial execution, torture and similar cruel, inhuman, and degrading treatment, enforced disappearance, and slavery. These are serious crimes which indicate a lack of integrity at a level that fundamentally affects a person’s credibility to hold public service.

Decisions concerning minimum criteria can be informed by international laws and norms. In Bosnia and Herzegovina, for example, the police certification program excluded officers who had committed “acts and/or omissions, and/or functions from the period of April 1992 to December 1995, which demonstrate the inability or unwillingness to uphold internationally recognized human rights standards.”²⁵ Similarly, in Argentina, where challenges to candidates for elected posts have revolved around the definition and reach of the term “suitability,” which is a requirement under the National Constitution, links have been made to international human rights instruments and international human rights law.²⁶

The determination of criteria, however, is often politically contested and controversial; understandably so, because these criteria reflect one way for a society to judge what was morally (if not necessarily criminally) unacceptable behavior in the past, as well as what the minimum standards of integrity in public institutions will be in the future. As Sotiropoulos comments in his chapter on Greece:

Where should the vetting process stop in regard to persons who worked for the authoritarian regime?... Even though one should differentiate, for example, between a military general and a conscript (hierarchical differentiation), as well as between a policeman who escorts a member of the democratic resistance to the torture chamber and a janitor of an armaments factory (sectoral differentiation), it is not easy to arrive at a consensus about where to draw the line.

Furthermore, the determination of vetting criteria will depend upon what can be feasibly implemented. As the “Vetting Guidelines” point out, “An integrity standard that is difficult to verify is unlikely to be useable in practice.” Serge Rumin demonstrates in his chapter on information management that vetting relies on the availability, reliability, and measurability of information and evidence.

In Greece, for example, institutions were screened only for people who had *actively* supported or identified with the junta, notes Sotiropoulos, in part because it would have been impossible to measure the actual support for the regime of the much larger number of officials who simply continued working for the state apparatus “as they would have done for any kind of rule.” In Germany, formal vetting criteria were established, but in practice “evidentiary problems” limited which criteria could actually be applied. As Wilke explains, the Ministry of State Security (Stasi or MfS) files, which were the most

accessible files, provided “the single most used and reliable source for the vetting process.” As a result, broader “public discussions about culpability, collaboration, and suitability for public office narrowed down” to one category of misconduct, namely, working for or collaborating with the Stasi. In the Czech Republic, the feasibility of verifying criteria actually led to a change in the law. Initially, the lustration law disqualified from holding public office those who had held positions in a political body or the repressive secret police, state security, and intelligence forces, as well as those who had collaborated with these entities. It turned out, however, that it was often technically impossible to distinguish between someone who had collaborated and someone who had in fact been a victim of the secret police, due to the unreliability of the secret police files; as a result, the criterion of collaboration became so controversial that it was annulled.²⁷

SANCTIONS: WHAT HAPPENS TO POSITIVELY VETTED INDIVIDUALS?

Vetting efforts also vary in an important, yet often underemphasized way—the sanction applied to individuals whose vetting results are positive. Positive vetting results lead not only to the exclusion or the removal of the public official from his or her post, but to a range of other sanctions as well. The nature of the sanction is important directly and symbolically for both individuals and the process as a whole. If the vetting has a punitive rationale (see below), then it matters whether a person is fired, suspended, offered a retirement package, transferred, given less responsibility, or simply has his or her past exposed. If the vetting is aimed at transforming institutions in order to prevent the recurrence of abuses, then it matters whether those who committed past abuses are actually removed from those institutions or not.

In Bosnia and Herzegovina, police officers who did not receive certification were no longer authorized to exercise police powers; they were terminated from employment and were not allowed to work with any law enforcement agency in the country. All judges and prosecutors had to reapply for their own positions as part of an open competition, and while some were not reappointed on the basis of “incriminating conflict-related information,” this was not made explicit and did not prohibit them from future appointments. As Mayer-Rieckh notes, some have called these exclusions “nonprosecutorial sanctions.” In El Salvador, the Ad Hoc Commission recommended that 103 officers be “transferred or dismissed”; some were sent abroad to diplomatic posts, some were retired from active duty, and some initially took leave with pay and retired later.²⁸ In Greece, as Sotiropoulos explains, “removal or dis-

qualification” covered a range of sanctions, including “placement in inactive rosters, forced retirement, transfer to insignificant posts, annulment of promotion, or temporary suspension of duty.” In Argentina, successful *impugnaciones* have led to military promotions being rejected, with no further consequences necessarily stemming from this rejection (although it is assumed that, given the reasons for the failure to gain the promotion, military careers will come to an end).²⁹

In the former communist countries in Eastern Europe, as well, vetting and lustration sanctions spanned the full spectrum. In the Czech Republic, what some refer to as “radical” lustration involved disqualification from holding office.³⁰ In Germany, employees who were to be dismissed were often offered the option of consensually terminating their contract rather than being fired, a move that would avoid the stigma of being fired but would also forfeit their ability to challenge the decision in court. In some places, many people who thought they would be exposed by the vetting procedure preemptively quit and took jobs elsewhere; these numbers would not show up in official vetting figures but can still be considered representative of people indirectly sanctioned.³¹ In Poland, what Adam Czarnota in his chapter in this volume calls “soft” lustration did not punish previous actions at all, only a “lustration lie”; those who made truthful declarations of collaboration with the secret services suffered no immediate consequences, since the system was designed to let the electorate decide whether someone with that past deserved to be voted into office. It was only those whose lustration declarations were determined to be false who lost their jobs as well as the “moral qualification to hold public office and a ban on holding one for ten years.”³² Hungary, finally, actually implemented a process referred to as “sanctionless lustration,” whereby individuals who were determined to have performed the activity in question were given the option of resigning or having the decision of the commission made public; “those who leave their office voluntarily are exempted from the explicit sanction of the law,” write Elizabeth Barrett, Péter Hack, and Ágnes Munkácsi.

DESIGN: WHAT ARE THE DIFFERENT TYPES OF VETTING PROCESSES, THEIR STRUCTURES, AND PROCEDURES?

Vetting measures also differ greatly in terms of their design. At a broad level, the most common type of vetting process is an administrative *review* of the past activities of the employees of a public institution. Such reviews occurred in various forms in East Germany, Greece, the Czech Republic, Hungary,

Poland, and El Salvador. In Bosnia and Herzegovina, however, a review process for the police was designed and implemented alongside a *reappointment* process for the judiciary and courts, in which all judges and prosecutors were removed from their positions and had to reapply in an open competition.³³ In Argentina, where a comprehensive review or reappointment process has not been politically possible, human rights groups have managed to use existing institutional mechanisms to challenge, through a process of *impugnación*, the promotion of military officers against whom there is evidence of past human rights abuses, as well as the credentials of candidates for elected office who are ethically unsuitable for similar reasons.³⁴

Within these broad types, however, there will also be different structures and procedures. As the “Vetting Guidelines” point out, it may be possible in certain instances to use existing procedures and bodies to screen public employees. In most cases, however, a new set of procedures is developed and at least one vetting body is created to perform or oversee the process; such bodies must have their members selected, staffs hired, financial and material resources apportioned, and security provided. In Germany, explains Wilke, two basic models of vetting commissions were employed “in response to different institutional demands and structures”: an administrative one, composed of unelected members of the institution; and a pluralistic one, composed of a mixture of elected and appointed members of the institution to be vetted and outsiders with professional expertise. Furthermore, vetting bodies can be centralized in one commission handling vetting for all public institutions, or they can be more decentralized and deal with vetting in one sector or one institution only. In the formerly communist countries of the Czech Republic, Poland, and Hungary, for example, the review processes were centralized; in Germany and Greece, in contrast, the case study authors describe the vetting as “decentralized” and “fragmented.”³⁵

Crucial to how vetting is designed and implemented, from a transitional justice perspective, are the procedural standards that the process maintains. As both Federico Andreu-Guzmán and the “Vetting Guidelines” point out in this volume, it is procedural guarantees that distinguish vetting from purges by ensuring that they conform to international human rights standards. According to Andreu-Guzmán, a fair and equitable vetting process will be one that is legitimate, safeguards human rights, is objective, is governed by the rule of law, is based on the principle of individual responsibility, and is relatively autonomous from criminal and regular disciplinary procedures. The specific minimal procedural guarantees necessary to achieve this in a vetting process

that involves removal or dismissal of employees, he argues, include the right to appeal an adverse decision to a court. Procedural guarantees should also be considered in relation to vetting sanctions: the more severe the sanction, the more rigorous should be the due process standards.

SCOPE: HOW MANY PEOPLE ARE ACTUALLY VETTED?

Scope refers to the size, extent, or reach of a vetting process, in terms of the number of individuals actually vetted. The measurable size of a vetting process includes both the number of people who are screened and the number of people who are positively identified as having engaged in the activity in question and who may then subsequently receive sanction. The scope of vetting processes varies widely across the cases; it is a function of decisions about the institutions and positions to be screened and the chosen criteria. And, as with many other elements of vetting, the actual number of people affected by vetting will also depend on other factors, such as the availability and reliability of information.³⁶

In post-apartheid South Africa, Jonathan Klaaren argues in this volume, where there was a choice made against vetting, and where public institutions transformed themselves primarily through processes of affirmative action and “rationalization” (integrating the apartheid-era public services), there were still some personnel selection procedures that, in certain instances, concerned themselves with human rights issues. The closest thing to vetting in the South Africa case was the Goldstone Commission, a judicial commission of inquiry, the work of which led to the dismissal of twenty-three senior commanders of the military intelligence.³⁷ In El Salvador, the Ad Hoc Commission requested information on the army officer corps of more than 2,000 individuals, but carried out interviews of only some of them; 103 of those were either dismissed or transferred for committing human rights violations.³⁸

More extensively, in Poland, where vetting is still ongoing, close to 24,000 individuals had completed lustration declarations by the time of writing; by 2004, 278 of these declarations had been positive and the Lustration Court had ruled on 103 cases of negative declarations, finding 53 of them untrue.³⁹ In East Germany, Wilke provides the figures for two city administrations. In Greifswald, out of 1,553 screened employees, 58 people were identified as having worked for the Stasi, and 18 of them were dismissed (5 of whom successfully sued for continued employment). In Dresden, about 520 out of 18,000 employees in 1990 lost their jobs because of vetting. In the East German

institutions examined by Wilke, however, “the numbers of dismissals were small in comparison to the job losses caused by shrinking public budgets.”

In Bosnia and Herzegovina, vetting was more comprehensive in the sectors in which it was applied. Between 1999 and 2002, the United Nations Mission in Bosnia and Herzegovina screened all 23,751 employees of the ministries of interior who presented themselves for the certification process; certification was denied to 481 officers. In the judiciary, between 2002 and 2004 the High Judicial and Prosecutorial Councils had to review the applications of approximately two thousand persons for appointment and reappointment to judicial and prosecutorial positions; 30% of incumbents were not reappointed, although only at times was this because of war-related misconduct.⁴⁰ In the Czech Republic, finally, at the larger end of the spectrum, rates of disqualification ranging between only 3% and 5% still mean that tens of thousands of people from a number of different government institutions have been barred from holding public office, as the total number vetted has reached over four hundred thousand.⁴¹

If a vetting process restricts its criteria for exclusion to individual behavior, then the percentages of each institution’s personnel that are dismissed tend to be quite small. Nevertheless, vetting may, in certain cases, lead to the dismissal of an “unacceptably large number of employees,”⁴² doing harm to the capacity of institutions — capacity that less-developed countries may not be able to do without.⁴³ Such “human capital costs” may be particularly high when institutions are purged rather than vetted.⁴⁴ In Iraq, for example, despite the concerns of Iraqis and outside observers about the effects that a wide-scale de-Baathification policy would have on the country’s ability to rebuild itself, the Coalition Provisional Authority ordered such a policy, which led to the firing of approximately thirty thousand former members of the Baath Party, including six thousand to twelve thousand educators. Concerns over the negative impact of the process later led to the return to their jobs of thousands of those dismissed.⁴⁵ At the same time, however, if most individuals in a particular institution do fit the individual criteria for exclusion, a vetting program would have to weigh the human capital costs of firing them all against the damage that would be done to the institution’s legitimacy if they all remained.

TIMING AND DURATION: WHEN DOES VETTING OCCUR AND HOW LONG DOES IT LAST?

The case studies demonstrate that vetting processes differ widely in their timing and duration. Timing refers to when, during a transition, vetting begins;

duration refers to how long the process lasts. The timing and duration of vetting will usually reflect the political landscape of the transition period; they will also be determined in part by other characteristics of the process, such as the numbers of institutions, positions, and people to be vetted.

In Greece, vetting of the academic community began swiftly, with legislation being passed within weeks of the collapse of the military regime in 1974, and lasted ten months. In the military, vetting proceeded gradually and in piecemeal fashion until the aftermath of an aborted coup in February 1975. Similarly, in El Salvador, the Ad Hoc Commission, which vetted the military, began working in May 1992, just four months after the final peace accord was signed; it was initially to last only three months and was then extended for another month, delivering its final report in September of the same year.⁴⁶

In Poland, on the other hand, the lustration law did not become valid until 1997 and was not enforced until 1999, nine years after the issue was first raised. At the time of writing, it had been in operation for six years, and there are discussions of broadening the process, sixteen years after the beginning of the transition. In Hungary, demand for lustration began in 1990, but the first law was not passed until 1994; lustration remains a high-profile issue sixteen years after the fall of communism, as new cases continue to arise. In Argentina, politicians and human rights organizations have been challenging military promotions for individuals accused of committing human rights violations since 1984, one year after the fall of the military dictatorship.⁴⁷

Timing can be important because of its potential impact on institutions. Individuals who are excluded from institutions early on in a transition will generally have less influence in the design and building up of those institutions than individuals who are excluded later. In Poland, for example, the fact that vetting was delayed for almost a decade meant the continued influence of members of the communist regime in the post-communist government structures. As Czarnota argues, in his chapter on Poland, "One of the critical factors in determining the effectiveness of lustration, particularly when the aim is to eliminate dangers to the new regime, is timing." Duration, for its part, is worth considering because of how it may affect the general perception and understanding of vetting's rationale. In the Czech Republic, writes Priban, the continued prolongation of the lustration law was "widely criticized as contradicting its original purpose and spirit. One of the main justifications of the law at the time of its drafting, which emphasized only a temporary effect of its discriminatory measures, thus turned out to be false."

RATIONALE: WHAT ARE THE REASONS FOR VETTING?

The primary *outcomes* of a vetting process exist at the individual and institutional levels: individuals will be screened and sanctioned, which will generally have at least some impact on the institution. But what is the *rationale* for engaging in vetting? As mentioned above, the reasons for vetting public institutions can be numerous and contested. They can be both broad and long term, as well as narrow and short term, and they can change over time. One can, nonetheless, draw conclusions about the rationale behind vetting programs from the demands made by the public, justifications made by the politicians and designers, the mandates and legislation, and the nature of the process itself. At a broad level, the case studies in this volume suggest at least two important reasons for vetting: to punish the perpetrators, and to transform institutions in order both to safeguard the democratic transition and to prevent the recurrence of human rights abuses. These rationales are not mutually exclusive, and they are not necessarily considered with equal weight.

Some see a clear, nonpunitive, primary rationale behind vetting. In Greece, writes Sotiropoulos, vetting “does not have a punitive rationale. . . . The rationale for vetting is linked to the legitimacy of the new democratic regime.” Similarly, in Bosnia and Herzegovina, Mayer-Rieckh argues that the main purpose of vetting was to build fair and effective institutions that would prevent future recurrences of human rights abuse, rather than punishment. In the Czech Republic, explains Priban, the lustration law was initially motivated as a response to the less fair and unregulated practice of “wild lustration,” political instability, and public concern with the potential damage that the presence of secret police agents could have within the new democratic institutions and processes. According to a judgment of the Czech Constitutional Court in 2001, the lustration law still had a “legitimate aim, which is the active protection of a democratic state from the dangers which could be brought to it by insufficiently loyal and little trustworthy public services.”⁴⁸ According to Pablo de Greiff, in his chapter in this volume, the most defensible of the various justifications for engaging in vetting is that it may prevent the recurrence of human rights violations, not by deterring individual behavior, but by helping to dismantle networks of criminal activity.

The reasons for vetting are not always agreed to by all, however, and they can change over time. In Poland, for example, says Czarnota, while “the aim of the lustration law was the security of the state and the elimination of potential political blackmail,” “in Polish public opinion there is another aim that is not explicitly stated in the statute, namely the realization of some sort of transitional justice.” Similarly, in East Germany, a gap existed between those

who conceptualized vetting as quasi-retributive and those who saw it as a way to measure loyalty to the state. In this case, the degree to which these different understandings of the rationale of vetting affected its implementation changed as the transition progressed. As time passed, the initial social understanding of vetting, which was “self-consciously retributive,” gave way to a more legal understanding of vetting, through which it was, according to Wilke, “codified and implemented with a utilitarian and prospective concern about the establishment of a loyal and credible service.” This was partly due to political changes but also partly due to the idea that the passage of time allowed an individual to demonstrate that he or she could act according to the new society’s laws and norms. In Hungary, write the case study authors, the lustration debate began with a concern over blackmail and only later with a “general moral cleansing.”⁴⁹

COHERENCE: HOW DOES VETTING RELATE TO OTHER MEASURES OF INSTITUTIONAL REFORM? HOW DOES IT RELATE TO OTHER TRANSITIONAL JUSTICE MEASURES?

The coherence of a vetting program refers to its relationship with broader programs of institutional reform and transitional justice. As mentioned above, vetting has an institutional impact and is therefore an element of institutional reform. Mayer-Rieckh explains, however, that vetting can be implemented as a stand-alone measure or as part of a broader program of institutional reform that seeks to change an organization’s structure and mandate. This degree of coherence has implications regarding a vetting program’s rationale. In his chapter on this topic, Mayer-Rieckh argues, “as a stand-alone measure, vetting is generally insufficient to ensure that abuses are not repeated. A coherent and holistic approach to transitional reform is necessary—albeit not sufficient—to effectively prevent abuses from recurring.” Other reform measures that reinforce vetting in the aftermath of massive abuse, he explains, are those seeking to improve accountability, independence, representation, and responsiveness.

In the cases in this volume, vetting has been implemented in varying degrees alongside or as part of a broader program of institutional reform. In South Africa, institutional reform was only in small part concerned with human rights violations and cleansing the public sector of people with certain backgrounds.⁵⁰ In Germany, according to Wilke, where vetting did focus on people’s past wrongdoing, vetting in the public sector was still only “the first step in a large-scale process of restructuring and personnel reduction.” Just

how much a vetting process is part of a larger program of institutional reform will depend on a number of factors, such as the particular model employed. A reappointment process, such as that used in the judiciary of Bosnia and Herzegovina, explains Mayer-Rieckh, in general provides a “better opportunity” than a review process to implement other reforms such as those addressing gender and ethnic imbalances.

Vetting is a measure of institutional reform, and institutional reform, in turn, can be an element of a comprehensive transitional justice policy. De Greiff discusses this type of coherence in his chapter in this volume. At the pragmatic level, according to him, vetting can “facilitate the application” of other measures of transitional justice, in particular criminal prosecutions, truth-telling efforts, and reparations to victims, and in this sense act as an “enabling condition.” Conceptually as well, argues de Greiff, vetting relates to other transitional justice measures through its trust-inducing potential.

Support for such a holistic approach to transitional justice, which suggests that the different measures reinforce each other and are insufficient on their own, can be found in the case studies. In El Salvador, for example, the report of the truth commission, which named names and provided a systematic critique of the armed forces, gave impetus to the wholesale vetting of the military leadership.⁵¹

It seems that incoherence with other transitional justice measures, however, is more often the case. In Bosnia and Herzegovina, despite the establishment of the International Criminal Tribunal for the Former Yugoslavia, there has been so far little else in the way of transitional justice. In Greece, prosecutions did accompany vetting, but only for a small circle at the leadership level.⁵² In Germany, Wilke argues that the failure to prosecute those who were politically responsible while dismissing low-level informers from their jobs was seen to undermine the legitimacy of the vetting process. In Argentina, the lack of established criminal responsibility actually hindered vetting efforts that could have relied on the evidence generated by trials. As Barbutto explains, it may be precisely because a “process of impunity” has lasted for more than twenty years that efforts to hold people accountable within the political sphere have also lasted so long and been the subject of so much debate.

TRANSITIONAL CONTEXT

Finally, it must be remembered that decisions about vetting processes take place within a broader context of the political transition that the country is

undergoing. This context can affect the design, implementation, and outcome of the vetting process in a number of ways. First, at a broad level, transitions from war to peace provide a sometimes very different context than transitions from authoritarianism to democracy.⁵³ This can influence vetting processes in a number of ways, such as criteria and scope. In post-authoritarian societies, for example, as mentioned above, vetting is more likely to involve screening members of public institutions for evidence of nonviolent forms of collaboration with the former regime, while post-conflict societies tend toward screening for violent, gross human rights violations. At the same time, however, post-authoritarian vetting, while searching for more “moderate” crimes, will often cast a much larger net because many more citizens are implicated.

Furthermore, the type of transition can shape the challenges and debates that vetting efforts will confront. As Rumin explains in his chapter on gathering and managing information, the nature of a vetting process will always be at least partially a function of the information that is available, which, in turn, will be partially a function of the nature of the former regime. The post-authoritarian governments in the former communist countries in Eastern Europe had at their disposal overwhelming amounts of secret police files on their citizens, files which are of uncertain reliability but are often the subject of much political debate and controversy. Post-conflict governments, on the other hand, are often faced with an almost complete absence of records. Instead of deciding how to handle mountains of evidence, they must design vetting processes with an eye to gathering whatever information they can, through the use of such tools as questionnaires. Of course, this will not necessarily be the case. In Argentina, for example, the clandestine character of state terror meant that hardly any official information at all was available, which meant that human rights groups had to rely on the information they themselves had gathered in order to challenge the integrity of members of the military.⁵⁴

Second, the specific political context in which the transition occurs can affect the nature of a vetting process. For example, in El Salvador and Bosnia and Herzegovina, where international actors played important roles in the respective peace processes, vetting processes were initiated in large part due to strong international pressure (and in the latter, were largely controlled by international actors⁵⁵). In Greece and Argentina, political considerations limited the transitional governments’ desire and/or ability to apply more extensive vetting efforts; in Greece, political stability in the face of tense relations with Turkey and preparation for integration into the European Economic Community was the top priority; in Argentina, in the immediate aftermath

of the transition, the power retained by the military and particularly its threat of uprising constrained the government's ability to pursue formal vetting.⁵⁶ In post-communist Eastern Europe, some commentators have argued that variation in the timing and form of lustration can best be explained by privileging "the dynamics of post-communist politics" over more historical factors such as the "mode of exit" from communism.⁵⁷ In South Africa, finally, Jonathan Klaaren argues that a choice was made against vetting as part of the larger political compromise that ended years of conflict, authoritarianism, and apartheid.

NOTES

- 1 For a study of war crimes tribunals since World War I, see Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2001). For analyses of recent criminal prosecutions in the aftermath of conflict, see the first three studies on Timor-Leste, Kosovo, and Sierra Leone in the ICTJ's *Prosecutions Case Studies Series* (New York: ICTJ, March 2006).
- 2 For a study of truth commissions, see Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001).
- 3 For the most comprehensive study of massive reparations programs, see Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), which resulted from a multiyear research project conducted by the ICTJ. See also K. De Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens, eds., *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen: Intersentia, 2005).
- 4 ICTJ, "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines," in this volume, hereinafter "Vetting Guidelines."
- 5 Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 8. Lustrations in the Czech Republic are described as an "administrative law measure," in that each one is "an administrative decision that states facts important for legal qualification for certain jobs in state administration and state-owned companies"; see chapter by Priban in this volume. Vetting is also related to criminal justice in a number of different ways and, to be done fairly, requires procedural justice; see chapter by Andreu-Guzmán in this volume. Vetting can also be conceived of as other forms of justice, such as retributive justice, in that it punishes perpetrators, or distributional justice, in that it can lead to the redistribution of resources.
- 6 See chapter by Mayer-Rieckh on Bosnia and Herzegovina in this volume.
- 7 Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge; New York: Cambridge University Press, 2004), 92.
- 8 Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 136.
- 9 Kieran Williams, Brigid Fowler, and Aleks Szczerbiak, "Explaining Lustration in Central Europe: A 'Post-communist Politics' Approach," *Democratization* 12, no. 1 (2005): 22–43, at 23.
- 10 Jens Meierhenrich, "The Ethics of Lustration," *Ethics and International Affairs* 20, no. 1 (Spring 2006): 99–120, at 99.
- 11 See David Cohen, "Transitional Justice in Divided Germany after 1945," and Henry Rousso, "The Purge in France: An Incomplete Story," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge; New York: Cambridge University Press, 2006).

- 12 See the chapters on the Czech Republic, Hungary, and Poland in this volume; Williams, Fowler, and Szczesbiak, "Explaining Lustration in Central Europe"; and Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (New York: Vintage, 1996).
- 13 See chapter by Andreu-Guzmán in this volume.
- 14 For South Africa, see chapter by Klaaren in this volume; for Northern Ireland, see Kieran McEvoy and Ciaran White, "Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship," *The Modern Law Review* 61, no. 3 (1998): 341–61.
- 15 Hereafter, "Vetting Guidelines." Although these refer directly to vetting in post-conflict situations only, their development benefited substantively from all the country case studies in this volume. They represent an effort both to establish more firmly the concept of vetting and to make this concept operational.
- 16 Available at http://www.undp.org/bcpr/documents/jssr/trans_justice/Vetting_Public_Employees_in_Post-Conflict_Settings.pdf.
- 17 Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States—Vetting: An Operational Framework* (New York and Geneva: OHCHR, 2006).
- 18 United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General*, UN Doc. S/2004/616, August 23, 2004, 17–18.
- 19 Meierhenrich, "The Ethics of Lustration," 103.
- 20 "Vetting Guidelines" in this volume.
- 21 See the chapter by Barrett, Hack, and Munkácsi in this volume.
- 22 See the chapter by Czarnota in this volume. It is only in Hungary and Poland that elected offices were subject to vetting; it is in these countries, however, that a positive result itself carried no direct punishment (see the section on sanctions below).
- 23 Wilke points out one implication of uneven application of vetting: the federal unemployment offices, which were not vetted before the mid-1990s at all, provided an avenue of employment, or a "safe haven," for individuals dismissed elsewhere in the public sector.
- 24 The South African government did end up dismissing twenty-three officers from military intelligence, but this was in response to public pressure and not an example of systematic vetting; see chapter by Klaaren in this volume. In Argentina, efforts have been made to challenge military promotions and candidates for elected office, but again these are not formal vetting processes; see chapter by Barbuto in this volume.
- 25 International Police Task Force Policy P10/2002, para. 2(h); see chapter by Mayer-Rieckh in this volume.
- 26 See chapter by Barbuto in this volume.
- 27 See chapter by Priiban in this volume.

- 28 See chapter by Zamora with David Holiday in this volume.
- 29 See chapter by Barbuto in this volume.
- 30 See chapter by Priban in this volume.
- 31 See chapter by Wilke in this volume.
- 32 Some individual institutions on their own decided to fire or otherwise sanction employees who had made positive declarations—a “side effect” or “extension of the lustration statute”; see chapter by Czarnota in this volume.
- 33 See chapter by Mayer-Rieckh on Bosnia and Herzegovina in this volume. For a comparison of review and reappointment process, see Mayer-Rieckh’s chapter on vetting and other transitional reforms in this volume.
- 34 See chapter by Barbuto in this volume.
- 35 Germany also provides several examples of what might be called an “unofficial reappointment” process. There, a number of university departments were completely dissolved purportedly because they were superfluous—as part of the “unraveling,” or *Abwicklung*—but were soon thereafter reopened, says Wilke, which “raised the question whether wholesale *Abwicklung* was used to circumvent the requirement of individual review before dismissing employees;” see her chapter in this volume.
- 36 In Hungary, for example, proof of “lustratable” activity included signed declarations or reports of activity, but, suggest the case study authors, given the “great numbers of documents destroyed, it is perhaps not surprising that such extensive proof of involvement was found only rarely.” See chapter by Barrett, Hack, and Munkácsi in this volume; see also chapter by Rumin in this volume.
- 37 See chapter by Klaaren in this volume.
- 38 See chapter by Zamora with Holiday in this volume.
- 39 See chapter by Czarnota in this volume.
- 40 See chapter by Mayer-Rieckh on Bosnia and Herzegovina in this volume.
- 41 See chapter by Priban in this volume.
- 42 “Vetting Guidelines” in this volume.
- 43 South Africa, for example, according to Maryam Kamali, chose not to implement a formal vetting process in part for such practical reasons: it “could not afford to dismiss large numbers of its professionals until a new generation of qualified professionals became available.” Germany, on the other hand, could afford vetting because it “had cadres of willing and qualified unemployed professionals in the western part of the country ready to take over.” Maryam Kamali, “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa,” *Columbia Journal of Transnational Law* 40 (2001): 89–141, at 136.
- 44 As Peter Boettke and Christopher Coyne explain, “Human capital resided in individuals who had to work within the system.... Eradicating those tied to the system indiscriminately will result in a loss of human capital that will be counter-productive to future

- reform." Peter J. Boettke and Christopher J. Coyne, "The Political Economy of Forgiveness: The Necessity of Post-Atrocity Reconciliation," *Society* 44, no. 2 (2007 forthcoming).
- 45 Eric Stover, Hanny Megally, and Hania Mufti, "Bremer's 'Gordian Knot': Transitional Justice and the U.S. Occupation of Iraq," *Human Rights Quarterly* 27, no. 3 (August 2005): 830–57.
- 46 See chapters by Sotiropoulos and Zamora with Holiday in this volume.
- 47 See chapters by Czarnota; Barrett, Hack, and Munkácsi; and Barbuto in this volume.
- 48 Quoted in the chapter by Priban in this volume.
- 49 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 50 See chapter by Klaaren in this volume.
- 51 See chapter by Zamora with Holiday in this volume.
- 52 See chapters by Mayer-Rieckh on Bosnia and Herzegovina and Sotiropoulos in this volume.
- 53 Foreign or international occupation provides a third type of context that is not examined in this volume, but which also affects the nature of vetting. For a discussion of "lustration" under the U.S. occupation of Iraq, see Meierhenrich, "The Ethics of Lustration." Claus Offe suggests that Germany offers a unique case because the German Democratic Republic ceased to exist and became part of the Federal Republic of Germany, which "came to play the role of the functional equivalent of the occupation regimes after the Second World War." Claus Offe, *Varieties of Transition: The Eastern European and East German Experience* (Cambridge, MA: MIT Press, 1997), 86.
- 54 See chapters by Rumin and Barbuto in this volume.
- 55 See chapters by Mayer-Rieckh on Bosnia and Herzegovina, and Zamora with Holiday in this volume. In Liberia, the vetting of recruits for the newly established armed forces is being performed by DynCorp, a U.S.-based private security company, contracted for the task by the U.S. government. See Human Rights Watch, "Liberia at a Crossroads: Human Rights Challenges for the New Government," Human Rights Watch Briefing Paper, September 30, 2005, <http://hrw.org/backgrounders/africa/liberia0905/>; accessed June 1, 2006.
- 56 See chapters by Sotiropoulos and Barbuto in this volume.
- 57 Williams, Fowler, and Szczerbiak, "Explaining Lustration in Central Europe," 23; also discussed in the chapter by Barrett, Hack, and Munkácsi in this volume.

PART I

Case Studies

CHAPTER 1

Strengthening Democracy:
Impugnación Procedures in Argentina

Valeria Barbuto¹

In contrast to countries that established vetting or lustration procedures after their transitions, Argentina did not. There is no formal vetting mechanism to speak of, in the traditional sense, in Argentina; there is no institutionalized procedure for examining the records of present or prospective employees in any area of the state apparatus and to screen them on that basis. Given the massive participation of members of the various branches of the military and security forces in state terrorism during the dictatorship, this represents a significant lack in Argentina's transitional "tool kit." However, human rights NGOs have made use of alternative avenues to achieve a sort of stepwise and perhaps indirect "cleansing, largely by taking advantage of procedures that under Argentine law allow challenges to promotion or staffing proposals. Some of these procedures—generally called *impugnación*—have come about as a consequence of broad reforms of institutional practices (for instance, reforms intended to increase the transparency of government or civil society participation in decisionmaking), rather than as explicitly designed procedures for screening personnel. This chapter will provide an overview of how procedures to impugn promotions in the military and police forces, to impugn those who aspire to hold electoral office in either the legislature or the executive branches, and to impugn members of the judiciary have been put to use in defense of a human rights and accountability agenda in Argentina.

STATE TERRORISM, DOCUMENTATION OF CRIMES, AND ESTABLISHING RESPONSIBILITY

The possibility of impugning those responsible for serious human rights violations depends as much on the existence of institutional mechanisms that make such procedures possible as on the quality and type of information available. The military dictatorship, established on March 24, 1976, distinguished itself by operating in a clandestine manner:

The main characteristic of the adopted system, which distinguishes it from other similar ones in Latin America, is the almost absolute clandestine quality of its procedures. For this reason, the detention of persons and their subsequent disappearance, as well as denying the acknowledgment of the responsibilities of the bodies that intervened in thousands of cases over a long period of time, are the key instruments of the method conceived and employed by the military government in order to act against suspects and active dissidents.²

As Emilio Mignone and Augusto Conte explain,³ the dictatorship operated on two normative levels. On the one hand, repression was carried out based on legislation limiting constitutional rights [*legislación de excepción*] that granted the government junta absolute power over the National Constitution. On the other hand, there was a set of rules for clandestine organizations and actions—a secret and parallel normativeness.

This ad hoc operational structure for repression was created and inserted into the ordinary organizational structure of the armed forces. Both structures were dependent on the same commander in chief. The clandestine structure was formed by cellular groups that were more or less stable, but involved the rotating participation of officials who were under the ordinary structure. These clandestine repression groups were in charge of kidnappings, disappearances, confiscating assets, stealing babies, and other crimes. The clandestine doctrine was approved by all members of the military high command (even brigadiers, generals, and admirals) and involved all active members of the military, who took turns in the execution of such activities, thereby ensuring their concealment.⁴

The military government systematically denied the existence of disappeared persons, assassinations, and clandestine detention centers, even giving false information to the press⁵ and to the families of the victims.⁶

In addition to making the acquisition of documentation and evidence extremely difficult, this clandestine system of repression spread suspicion of responsibility for these crimes to every member of the armed forces. After the rule of law was reinstated, it became impossible to build military institutions in accordance with democratic principles without making personnel changes [*depuración interna*] or without the judicial system determining the individuals who had to be removed from their posts.

During the dictatorship, documentation of state crimes was produced by human rights organizations. Based on accusations made by the victims, these organizations documented and explained the structure of repression and its

clandestine nature, publicized the situation in the national and international arenas, and filed accusations before the courts.

By 1979, for example, the Permanent Assembly for Human Rights [*Asamblea Permanente por los Derechos Humanos*] (APDH) had 5,818⁷ documented cases of forced disappearances.⁸ In 1984, human rights organizations delivered a list of 896 persons responsible for these crimes to the National Congress.⁹ These numbers are not exhaustive and do not present the whole picture, which was much worse. But it is important to stress that they were produced in a context in which archives or official data were unavailable, and were based on the testimony of those who dared to speak up in the midst of terror-induced social paralysis.¹⁰ For many years, these testimonies and the NGO archives were the only available information about the state's crimes. Without a doubt, the information gathered by human rights organizations formed the basis for later accounts of state terrorism, the rejection of the dictatorship, and, with time, the people's trust in democracy.

The transition process initiated in 1983 posed the fundamental challenge of building and consolidating democratic institutions. However, over time, President Raúl Alfonsín's (1983–89) main objective became to prevent new coups d'état, even if this hindered the strengthening of public institutions. Crucial for the attainment of this goal of stability and of constructing civil-military relationships in the new political framework was the way serious human rights violations committed during the military dictatorship would be addressed by the new democratic regime.

The reinstitutionalization of the armed forces required taking political measures to dismantle them as political actors and subordinate them to civilian power. A series of legislative measures was therefore passed in order to "privilege national defense as the exclusive arena of organization and operation of the armed forces, to reformulate its mission and institutional functions, and to strike down the set of legal and institutional prerogatives that they held on matters of internal security."¹¹ This normative framework was established with the laws on national defense,¹² internal security,¹³ and, later, national intelligence.¹⁴

At the same time, in any transition the way in which human rights violations committed by previous regimes are confronted is crucial in determining how the institutional, social, and cultural reconstruction of society will take shape. In the Argentinean case, the emerging democracy was characterized by a far-reaching and deeply embedded societal consensus that linked the legitimacy of the new state to the rule of law and the cause of human rights. In fact, Raúl Alfonsín's campaign for election was marked by its

promises to investigate and prosecute those responsible for the previous regime's crimes.

On December 12, 1983 (two days after the president was sworn in), Decree 158/83¹⁵ called for the prosecution of the first three military juntas before the Supreme Council of the Armed Forces [*Consejo Supremo de las Fuerzas Armadas*] (CONSUFA) for the crimes of homicide, illegal deprivation of freedom, and torture. With these trials, the government hoped that the armed forces would carry out their own process of internal "cleansing." On December 14 another decree¹⁶ created an investigating commission, the National Commission on the Disappearance of Persons [*Comisión Nacional sobre la Desaparición de Personas*] (CONADEP). CONADEP's task was to respond to civil society's demands for truth regarding these crimes. It received accusations filed by the families of disappeared persons and gathered other accusations that were already in the archives of human rights organizations. This made it possible for many families to denounce these crimes publicly for the first time. Exiles also provided their testimonies from abroad, through embassies and consulates.

Although CONADEP provided fundamental evidence for the acknowledgement of these crimes and their methods, however, it lacked the capacity to carry out investigations. It was only authorized to receive voluntary testimonies, document them, and send the files that it deemed appropriate to the courts.¹⁷

For an analysis of Argentina's *impugnación* policies and procedures it is important to remember that CONADEP concluded its activities with the publication of a final report, *Nunca Más*, which did *not* include the list of those responsible for these crimes. That list, however, was published without official authorization in the magazine *El Periodista de Buenos Aires* in November 1984. Based on the testimonies of survivors, the families of victims, and a few former members of the armed and security forces, the number on this list reached 1,351 persons presumably responsible for the crimes covered in the report.

Given the slow pace with which CONSUFA undertook the trial of the military juntas, in April 1985 the Federal Chamber on Criminal and Correctional Matters of the Federal Capital [*Cámara Federal en lo Criminal y Correccional de la Capital Federal*] took charge of the case, and on December 9 of that year pronounced its sentence.¹⁸ It condemned five commanders of the military juntas for homicide, illegal deprivation of liberty, and torture, among other crimes.¹⁹ The court determined the existence of a deliberate and systematic plan for executing a secret policy of repression and that this policy became the main

weapon used by the dictatorship in its campaign of “eliminating subversion.” According to Juan Méndez, “the report by CONADEP and previous declarations made by human rights organizations were now validated by the authority of a court that reached its conclusion by confronting the evidence.”²⁰

By the time the trial of the juntas concluded, it is estimated that 2,000 accusations had been filed before the courts, and that 650 members of the various forces (armed, security, police, and penitentiary) had been accused (though no investigations were carried out against them). Two-thirds of them continued in active service when these accusations were filed.²¹ As a result of strong pressure from the military, however, the Final Stop Law²² was sanctioned in December 1986, which declared that the statute of limitations for further criminal prosecutions was 60 days. After this period, no one who had not already been questioned and processed [*indagadas y procesadas*] could be questioned and processed in the future. The argument made was that, for “reasons of state,” democratic stability had to be privileged.

Paradoxically, however, within 30 days of the promulgation of the law, thanks to the work undertaken by human rights organizations and the families of victims, and the commitment of some judges, countless accusations were filed before the courts and hundreds of prosecutions were carried out. The law ended up working against the government’s strategy, worsening its relations with the military, and causing it to lose political prestige. It is in this context that the military insurrection during Holy Week in April 1987, in which the men in uniform demanded amnesty for the crimes of the dictatorship and reinstatement of the members of the military high command who had been removed, must be understood.

The Law of Due Obedience²³ was the consequence of this military crisis. This law obliged judges to presume that chief officials, subordinate officials, subofficials, and personnel of the armed, security, police, and penitentiary forces who acted with the alleged aim of suppressing terrorism during the dictatorship did so while obeying orders under coercion by superior authorities. This presumption had to be applied even if there existed proof to the contrary. Thus, all those members of the security services were exempt from criminal accountability. These measures created a public perception that there was a conflict between the development of judicial processes and democracy. Indeed, the ability of the judicial branch to conduct investigations and produce the necessary evidence in order to remove from their posts those members of the armed forces responsible for these crimes was being limited.

Finally, President Carlos Menem (1989–99) granted a series of pardons to those commanders who had been sentenced in 1985 and to other persons who

were under investigation as part of the judicial process.²⁴ The justification, in this case, was to have closure on the judgment of the crimes of the dictatorship and “look ahead” to the future. This argument is still used each time the promotion of a member of the armed force is impugned due to his participation in the dictatorship.

The sanctioning of the impunity laws²⁵ and pardon decrees benefited about 1,200²⁶ members of the military and security forces. As a result of these measures, the courts could not establish individual responsibility, which in turn hindered the institutional “cleansing” of the armed forces. The closure of the criminal cases meant that the evidence they would have produced could not be used as the basis for complementary measures—including removing members from their posts. Nevertheless, judicial processes continued for crimes that were not covered by these impunity laws: the kidnapping of children and the confiscation of the assets of victims.

After the possibility of prosecuting those responsible for forced disappearances and torture was closed, some alternative paths of justice were opened. In order to fully understand the process that followed, it is necessary to take into account some of the changes introduced by the reforms made to the National Constitution [*Constitución Nacional*] (CN) in 1994. Among other changes, this reform incorporated within the CN the principle of a close tie between human rights and the democratic system.

Two changes have particular implications for analyzing Argentina’s *impugnación* processes. First, article 36 establishes that:

This Constitution will maintain its rule even when its observance is interrupted due to acts of force against the institutional order and the democratic system. These acts will be irrevocably null and void.

Their authors will be subject to the sanction provided in article 29, perpetually barred from occupying public posts and excluded from pardons and commutation of sentence benefits.

Those who, as a consequence of these acts, usurp the functions provided to the authorities of this Constitution or to the regional governments will have the same sanctions and will have to respond civilly and criminally for their actions.

All citizens have the right to resist against those who commit the acts of force stated in this article.

In this manner, it is considered an attempt against the democratic system to commit a serious *dolus* crime against the State that entails enrichment, and that person will be barred from occupying public posts or employment for as long as the laws determine.

The Congress will sanction a law on ethical public behavior for performing public functions.

The incorporation of this article constituted a central argument in the *impugnacións* of new appointees to public posts.

Second, the reforms granted constitutional status to those international human rights instruments that had already been ratified by Argentina.²⁷ This enabled domestic use of international legal arguments on human rights, which was essential, for example, in order to demonstrate the unconstitutional character of the Due Obedience and Final Stop laws, and in order to demand compliance with the right to truth and mourning.

Since 1985, human rights organizations had demanded recognition of the right of both the families of the victims and of society to know the truth about what had occurred. NGOs first sought to realize this right through judicial cases. In the face of limitations on prosecuting those responsible for these crimes, however, they sought to find an answer to the final whereabouts of each one of the disappeared persons through “truth trials.”

For humanitarian organizations, the point of these trials was not only to comply with a right that was recognized nationally and internationally, but also the possibility of continuing to work within the judiciary so as to try to ensure that at least one branch of the state dealt with the subject. After one lawsuit reached the Inter-American Commission on Human Rights (IACHR) in 1999, Argentina signed a “friendly solution agreement” in which it committed itself to carrying out such trials. Today, many trials for the right to truth are held in Argentinean jurisdictions. A lack of regulations regarding these suits, however, means that each court proceeds differently, according to its own interpretation of the norms for proceedings. However, all cases involve intense activity in which many testimonies are gathered, providing a great amount of information about the state’s crimes and methods.

In 2000, the Center for Legal and Social Studies [*Centro de Estudios Legales y Sociales*] (CELS) brought a suit disputing the constitutionality of the Due Obedience and Final Stop laws, and on this basis, demanded that criminal prosecutions be reopened for the crimes of forced disappearance of persons, torture, and homicide. Between 2001 and 2003, approximately a dozen resolutions by the judiciary confirmed the unconstitutional character of these laws and allowed the resumption of trials against the main parties responsible for these crimes.

In mid-2003, in a more favorable political environment, the resolutions by the courts regarding the unconstitutional character of the impunity laws, as well as the detention with the aim of extradition of 45 members of the

military and a civilian ordered by Spanish Judge Baltazar Garzón, restarted the debate on the possible annulment by Parliament of the Due Obedience and Final Stop laws. That same month, the Federal Chamber ordered lower courts to reopen those cases from the 1980s, the so-called megacases [*megacausas*].²⁸

In June 2005, in a historical decision, the Supreme Court declared the Due Obedience and Final Stop laws to be unconstitutional. This opened the way for justice. Since then, 547 persons have been indicted, of whom 200 are in detention, charged with abducting children, robbery, illegitimate deprivation of liberty, torture, murder, and involuntary servitude.²⁹

This overview of some of the historical events shows how the crimes of the dictatorship and the responsible parties have been documented. It also shows how justice has not yet been achieved through these criminal cases. As Jonathan Miller indicates, “if republican institutions had enjoyed full functionality,”³⁰ the very court sentences would have resulted in dismissals and exclusions from any public post. Given the absence of such sentences, the task of removing from their posts persons who committed violations had to be achieved through other institutional mechanisms.

IMPUGNING MILITARY PROMOTIONS

PROCEDURES FOR IMPUGNING MILITARY PROMOTIONS

In Argentina, mechanisms for promoting members of the military to higher ranks form a complex system involving the armed forces, the executive branch, the legislative branch, and civil society. Approving or rejecting military promotions is fundamentally a political decision about the appointment of public officials. The absence of both a “cleansing” process of the armed forces and of criminal trials led human rights organizations and some legislators to turn to *impugnación* as a method to achieve a slow cleansing of the armed forces.

Article 99, clause 13 of the National Constitution grants the president of the nation the authority to provide “the military employments of the Nation: in agreement with the Senate, in the case of concession of employment or high official ranks of the armed forces; and on his own if on the battlefield.” By virtue of this clause, the executive branch sends to Congress a series of proposals for promotions in the higher ranks of the military. This list of promotions is elaborated according to the provisions of Law 19.101 (Law of Military Personnel). A qualifying commission [*Junta de Calificaciones*] is in charge of evaluating whether the proposed individuals comply with the requirements. The Senate

sends the list of members of the military provided by the executive branch to its Treaties Commission [*Comisión de Acuerdos*]. This commission has the authority to rule over all agreements petitioned by the executive branch regarding the posts of public officials.³¹ Its decisions have to be submitted for consideration and voting to the plenum of the Senate.

Amendments made to Senate regulations in 2002 broadened the requirements for publicizing the lists of proposals for agreement and the opportunities for civil society to present commentary. The lists of proposals sent by the executive branch were to be debated during public sessions and distributed by the pressroom of the Senate for possible observations:

Citizens may exercise this right within seven working days following the moment the petition for agreement is read in the chamber, thus having parliamentary status. The commission will also receive observations regarding the proposals, while the lists are under its consideration.³²

The reforms of 2002 and 2003 produced a deep change in the criteria regarding the nature of congressional activity: the publicity of institutional acts is now a general norm, secrecy is an exceptional norm that must be explicitly justified, and the participation of citizens is an important condition.

The Congress recognizes various forms of access and participation of citizens. These include both public sessions of Congress, in which citizens can witness debates and have access to transcripts, and, since 2002, public hearings.³³ Senate regulations recognize the following as a public hearing:

An instance of participation for citizens during the process of making a legislative decision that opens a window so that all persons or non-governmental organizations that can be affected by this decision or that have a particular interest in it may express their opinion. This instance helps the commission in charge of studying an affair or project to have access to the various opinions on the issue through direct contact with the interested parties, in a simultaneous manner and on equal terms.³⁴

An interesting aspect of the public hearing procedure is that the Senate's commission must explain how its decisions take into account the opinions expressed by citizens. This establishes an instance of publicity for public acts and of expression by civil society, as well as a mechanism for starting a dialogue between citizens and public institutions.

Since 1993,³⁵ the Treaties Commission has requested information about individuals on the lists of proposed military promotions from the archives of the former CONADEP, the Secretariat of Human Rights, the CELS, and

the APDH. It has requested, in particular, that these organizations submit all information available in their archives concerning the performance of these members of the military. In this capacity, these organizations have participated in public sessions and public hearings on some occasions. They have also proposed that the commission summon witnesses to testify and that it produce its own evidence. The *impugnación* procedure for military promotions has thus become more complex since the reforms to the Regulations of the Senate, regarding openness and public participation, and as human rights organizations have become involved in the process.

IMPUGNING MILITARY PROMOTIONS: PRACTICE AND CHALLENGES

Human rights organizations have impugned military promotions since 1984. However, during this period, the development of the *impugnación* procedures has varied according to a number of political and social factors, including the influence of civil society and the military, and the policies of the various governments.

The Radical Civic Union [*Unión Cívica Radical*] (UCR) stated on many occasions during its term, from 1983 to 1989, that the courts should deal with the issue of cleansing the military of those who participated in state terror. On the other hand, it also promised to carry out a reform of the armed and security forces that would guarantee their democratic functioning. In the end, however, neither intervention by the courts nor any mechanism of “cleansing” the forces has taken place. In general terms, the 1980s displayed a lack of a policy to remove from military institutions officials involved in practices of state terrorism. That decade saw a government that, overwhelmed by repeated military uprisings, in the end had to make a pact to forego the pursuit of justice for the crimes of the dictatorship. It is in this context that one must place the rejection of the *impugnacións* presented by the NGOs and the subsequent promotions endorsed by Congress that followed.

Until the Senate reform of 2002, Parliament operated under a “culture of secrecy,” which affected the *impugnación* processes, especially regarding how sessions of the commissions were held and their decisions made. The Treaties Commission worked behind closed doors, and civil society only had access to press releases from the government following long bureaucratic proceedings. Alfonsín’s government, in addition, did not display any great interest in including human rights organizations as interlocutors in the process of analyzing the records of the men in uniform:

One of the first measures adopted by Alfonsín's government dealt with the lists of proposals for promotion of well-known repressors. Human rights organizations impugned these proposals as a group. Even though these proposed members were promoted, nonetheless, organizations acquired practice in impugning promotions. Neither the government nor Congress consulted us then, however. Only some congressional advisors requested information from us, informally. Alfonsín accepted the lists sent by the qualifying commission without any objections.³⁶

The press published partial or complete lists of officials whose promotions were subject to review. Armed with this information, human rights organizations would send a letter to Congress with their queries. The letter would include general documentary material, including excerpts from or complete testimonies by survivors, newspaper articles, and copies of relevant judicial documents. During those early years, human rights organizations presented the queries concerning members of the military together as a group.³⁷

In March 1984, the executive branch sent to Congress a list of 213 members of the military to be promoted. Some senators from different parties questioned the promotion of those who were accused of having participated in the repression. In August of the same year, human rights organizations sent to Congress a list of 896 members accused of being responsible for human rights violations. According to *El Clarín*, 40% of the names on this list were still on active duty.³⁸ Among the 213 officers proposed for promotions, twenty five were on the list presented by the organizations. Even more meaningful was that it included seven of the thirteen candidates for generals and chiefs of the high command of the navy and the air force.

Senators of the Justicialist Party [*Partido Justicialista*] (PJ) pointed out that 15 proposed promotions had to be impugned by virtue of the information in CONADEP's report. During a crisis in July of that year, when at least two chiefs of military regiments refused to cooperate with CONADEP, President Alfonsín had pressured the Treaties Commission to sign the promotions. With the vote of the UCR senators, regional parties, and one representative of the Movement for Integration and Development [*Movimiento de Integración y Desarrollo*] (MID), and after a very contested voting process, Congress ratified the lists on August 31.³⁹

Those who supported the promotions of the members of the military under question, including the senators who voted in favor, argued that the criterion for rejection should consist only of charges that had been proved in the courts. This not only contravened the principle of political decision operating

in these promotion mechanisms, but satisfying this requirement was also virtually impossible in 1985, only two years after the first constitutional government was sworn in, since no judicial cases had yet produced sentences.

The careers that many impugned members of the military would go on to have reveals the close relationship they maintained with the different constitutional governments. The weakness of civilian control over the military and the dearth of political will on the part of the government to demand military self-criticism and to carry out institutional reforms were essential characteristics of the 1980s. As an illustration, in December 1985, despite the fact that his promotion was impugned, Captain Roberto Luis Pertussio was nevertheless promoted. Shortly thereafter, at a graduation ceremony of high-ranking officials, with the minister of defense in the audience, Pertussio defended what occurred during the dictatorship, notwithstanding the fact that his speech challenged the government's position regarding the importance of punishing crimes of state. Most of those whose promotions were impugned continued their careers until they participated in the military uprising of 1990, or until they made public their antidemocratic stances.⁴⁰

In the 1990s, promotion processes became more complex. One of the reasons for this was the experience that civil society organizations had gained in using institutional mechanisms. Another important factor was that the highest position in the Joint Chiefs of the Armed Forces [*Estado Mayor Conjunto*] was now occupied by General Martín Balza, who distanced himself from the military sectors that supported and vindicated the dictatorship.

The process became more complex also by virtue of greater sophistication on the part of senators, who by then were more experienced in their legislative practice. This could be seen in the nature of the debates in Congress over the agreements. Thus, for instance, a major change became visible in 1993, when the list of promotions included marines Juan Carlos Rolón and Antonio Pernías, two well-known repressors at the Navy Mechanics School [*Escuela de Mecánica de la Armada*] (ESMA).⁴¹ As soon as the list was released, human rights organizations sent their objections to the Treaties Commission. Together with a brief summary of the records of these two marines, they included copies of testimonies by survivors and actions taken by the courts. The controversy was further fueled by the publicity surrounding the opening of the "Archives of Terror" [*Archivos del Terror*] in Paraguay. These archives revealed, among other things, the active role that the Argentinean navy had played in coordinating repressive actions with other dictatorships in South America. On December 28, 1993, journalist Horacio Verbitsky published in *Página/12* information provided by the victims and their families about the

past actions of the accused. The following day the government denied having sent promotions lists with the names of the two marines, but admitted to it three days later. The controversy resulted in the resignation of the vice-minister of defense and three undersecretaries.

Carlos Menem's government, however, backed the marines strongly, provoking an intense public debate for two reasons: first, both marines were well-known for their participation in state terrorism under the dictatorship; and, second, they had publicly acknowledged the methods of torture, disappearing persons, and murder employed by the navy during a session of the Senate called by the Treaties Commission on October 19, 1994, when they had been summoned to provide a response to their charges. President Menem even declared publicly that he had the "moral authority" to support these promotions because he had been detained and tortured himself during the dictatorship. He was not, however, in Argentina when the marines appeared before Congress, nor was the commander of the navy.⁴² Given the situation, the Treaties Commission signed a writ against these promotions. However, this document was never debated in a plenary of the Senate, and the pro-government faction managed to send it back to the commission to be reevaluated.

In 1995, a former torturer, marine Adolfo Scilingo, acknowledged that it had been a systematic practice by the navy under the dictatorship to throw live prisoners into the Plata River. He said that one of his motivations for making such a statement was the "unfair" reaction to the proposed promotions of Rolón and Pernías. According to him, the navy's clandestine groups were formed in such a way that their membership rotated among all members of the force and, furthermore, the navy had made the decision and given the corresponding orders to eliminate persons by such methods. Hence, if these two marines were questioned, all high ranks of the navy had to be questioned as well. Either one questioned everyone or no one, argued Scilingo. On April 25, 1995, General Martín Balza, commander of the Joints Chiefs of the Armed Forces, publicly criticized the armed forces for its role in the crimes of the dictatorship. On May 4, Enrique Molina Pico, commander of the Joint Chiefs of the Navy, did the same. Although the two statements differed in content and the boldness with which they acknowledged human rights violations, Molina Pico at least recognized that the armed forces had used the wrong methods, which had led to "horrors that were unacceptable." Both statements went much further than what President Menem himself was willing to admit.

Debate about these promotions, which continued into 1995, produced an important political crisis. In August of that year, the two marines asked to be retired.⁴³ The case, almost ten years after the installation of the

constitutional regime, demonstrated at least two important facts. First, it was possible to stop the careers of repressors without damaging the military institutions and without provoking a military uprising. Second, there was another influential sector to which the government had to pay special attention: civil society. Pressure to make the process more open and public forced some public officials to begin to act according to the law and common sense.

In this new context, Congress started to send official requests for information about members of the military to be promoted to the APDH and CELS. Similar requests were made to the Office of the Undersecretary for Human Rights of the Nation [*Subsecretaría de Derechos Humanos de la Nación*]—today with the rank of Secretariat of State—keeper of the CONADEP archives and other, later files of accusations. These official requests not only demonstrated that the queries and documentation being provided had become part of the procedure; they also opened the possibility of holding hearings with the Treaties Commission in which civil society could participate.

There are a number of other important ways in which the mechanisms for impugning military promotions have changed. In the first place, it is now possible for the military to reply to the queries presented in the *impugnacións*. Second, the Ministry of Defense now sends to the commission the military file of the individual being proposed for promotion. This information has been of great importance, considering the lack of other official documentation. Human rights organizations, in turn, have become better at answering the requests for information from the Treaties Commission. In most cases, the documentary evidence of participation in the crimes of the dictatorship has been conclusive, and therefore of the kind to raise serious questions about the proposed promotions. Third, in other cases these organizations have suggested that the Treaties Commission conduct its own investigations and produce its own evidence. These were cases that involved members of the armed forces about whom there was some suspicion, but no certainty, of past crimes. In 2001, for instance, CELS responded to a request for information by the Treaties Commission stating that:

regarding Commander Vicente Engelman: in our presentation of November 12, we delivered the information on him in our possession to the Commission so that it could be evaluated. We understand that this information might not be enough to affect his suitability for promotion, but it must be considered by the Commission together with other elements of his record and evidence that may be gathered following the authority of this body. Also, this would establish clearly its stance

regarding State terrorism and would corroborate its commitment to the democratic system and respect for human rights.⁴⁴

Since the start of the democratic transition, the military has repeatedly demonstrated its unease with and applied pressure on political decisions related to efforts to disclose the truth and achieve justice. Until 1990, this included failed assassination attempts and military uprisings. Later, church pulpits and military events were used as the occasions for speeches to express opposition. On March 2, 2001, the military's resistance to the practice of *impugnación*, among other justice measures, manifested itself in the form of 663 petitions for *habeas data*⁴⁵ before CELS, the APDH, and the Office of the Undersecretary for Human Rights.⁴⁶ In their petitions, the members of the military demanded access to their personal information contained in the archives of these organizations. CELS only possessed information on nine officials suspected of being involved in serious human rights violations, representing less than 1.5% of the members of the military who had presented petitions. However, the commander of the army was included among them. The APDH refused to provide the information in its possession. CELS argued that Law 25.326 (Protection of Personal Data, commonly known as "*Habeas Data Law*") was not applicable to the institution since CELS is not a database meant to "provide information," but, nevertheless, expressed its willingness to comply. Since the petitions were missing some information that was necessary for CELS to complete its search, it asked petitioners to fill in some of the basic information they lacked. After 45 days, CELS did not receive a response from the members of the military, so it decided to deliver the information in its possession, clarifying that it considered it partial and incomplete owing, in part, to the lack of response to its own request for the missing data. In context, it is difficult not to see the military's *habeas data* requests as part of a pattern of opposition to the *impugnación* of promotions.

Since 2002, *impugnación* processes have been related to issues of institutional public disclosure, control of institutions, and debates on public policies. Specifically, they have accelerated evidence production mechanisms by the Congress and disclosure of information through public sessions and hearings. At the start of 2002, for example, the Treaties Commission initiated an investigation into the records of marine Julio César Binotti and Lieutenant Colonel Mariano Braga. In both cases, after CELS called for openness in the process, a public session was held in which the testimonies of survivors and families of victims were recorded.

The promotion process for Roberto Bendini, commander of the Joint Chiefs of the Army, in October 2003, provided an opportunity for Congress

to get involved in the case of a public accusation and to test the executive branch's commitment to public disclosure and transparency. Some months before, the media had reported that Bendini had made statements that vindicated the crimes of the dictatorship as well as some anti-Semitic statements.⁴⁷ The Ministry of Defense created an ad hoc commission to investigate the incident and concluded that the accusations were false, but never made its report public.⁴⁸ CELS then requested that the Treaties Commission attempt to access the report, make it public, and conduct its own investigation.

The Treaties Commission suspended consideration of the list of proposed promotions, requested from the executive branch a copy of the record issued by the Ministry of Defense, and summoned the president of the ad hoc commission to testify. In the end, the army commander was promoted, and CELS stated that Congress's actions had not dispelled the doubts concerning his suitability. Nevertheless, the process represented an important exercise in public disclosure and accountability, participation by civil society, and control by the legislative branch.

Although it would be very useful to have the exact number of impugned promotions from 1983 to date—as well as their results—it is impossible to know, at least in part because no data about this were kept in the 1980s. This brief summary of some of the procedures cannot substitute for this information, but may, nevertheless, illustrate some of the changes that *impugnación* procedures have suffered over time, in the state's policies towards justice for the crimes of the dictatorship, and in various institutions including the armed forces.

IMPUGNING APPOINTMENTS AND REMOVING PERSONNEL IN THE POLICE AND SECURITY FORCES

In the case of Argentina's police forces (federal and regional) and security forces (National Gendarmerie, Argentinean Navy Prefecture, and National Aeronautical Police Force), there have also been no formal *impugnación* procedures for serious human rights violations committed under the military dictatorship. During this period of state terrorism, police and security forces were under the operational command of the armed forces. This meant that when the first actions for truth and the first lawsuits (the trial of the juntas, etc.) took place, the responsibility of the police forces was not investigated. As with the armed forces, however, since 1983 human rights organizations have demanded the removal from the police and security forces of those who were

involved in clandestine activities. These demands were sent to the ministry that controlled the forces at the time of the case (the Ministry of Interior or the Ministry of Justice, according to successive reforms).

One example of these demands followed the appointment of Ricardo Scifo Módica as Chief Inspector for the Guidance for Victims [*Orientación a la Víctima*] of the Federal Police. On May 27, 1996, when the newspaper *La Nación*⁴⁹ published a story explaining the tasks of this new section, some survivors of clandestine detention centers — *Club Atlético*, *El Banco*, and *El Olimpo* — identified Scifo Módica as a member of one of the groups that had operated these centers, using the nickname *alacrán* (scorpion).⁵⁰ Human rights organizations and some legislators⁵¹ publicly objected to this appointment. CELS sent Minister of Interior Carlos Corach a letter expressing its concern, which was based on the need to remove this official from the post in line with the institutional movement towards a democratic regime:

[CELS] considers that this appointment should be revoked since it would offend the ethical conscience not only of the nation, but also of humanity, and would doubtlessly give rise to harmful reactions against the Constitutional Government and the Federal Police itself. The Argentinean people aspire to a life of peace founded on truth and justice. It is by virtue of this that it becomes necessary to avoid this type of unjustified vindication that conspires against this aim. The Argentinean State, on the other hand, has subscribed, ratified, and incorporated into the National Constitution international agreements that would be violated with this measure.

These organizations continue to demand that those responsible for such crimes be dismissed from the police and security forces, which would involve the loss of privileges and rights to which the members of the police are entitled, explicitly forbidding applications for readmittance into the force.⁵² NGOs continue to make such requests notwithstanding the frequent refusal of the authorities to stop the appointments or promotions, refusals that include the case of Scifo Módica, whose appointment in the Federal Police moved forward.

In the case of the police and the security forces, however, unlike the armed forces, there is no institutional mechanism of promotions to higher ranks that involves other state bodies or allows for the participation of citizens. The system of transfers and promotions is based on seniority and the information contained in the police files (for instance, regarding the past application

of internal sanctions). CELS and Human Rights Watch have stated that these systems are

structured on the basis of two rigid rosters—higher and subordinated personnel—and mobility within each one of them is random. Mechanisms with a very low level of public scrutiny such as the ones used for these decisions generate a system without objective criteria, depending on the arbitrariness of hierarchically superior members.⁵³

These organizations have proposed creating an “ethical commission” including members of other branches of the state and civil society to be in charge of appointing officials, so as to exercise a measure of public control of police and security institutions.

Some specialists contend that the lack of public controls in this sector is related to long-standing institutional practices. First, to an operational dependency on the executive branch, which, in the end, is responsible for these institutions:

until 1946 the chief of police [federal] was always a member of the upper class—congressman, general of the nation, former governor, senator—not someone from the force itself, a career policeman. After 1955, this again became the case and during the dictatorship (and the previous military governments), they were also career members of the military, and this continued to be so until 1983.⁵⁴

Second, the police, owing to its characteristic functions, have maintained important prerogatives. In this sense, a set of customary practices has granted the police far-reaching powers that protect it from possible controls by other branches of the state. Parallel to this problem is the close dependency of the judicial branch on the police, which hinders its actions:

the judiciary has had (and still has) a very strong and coactive dependency on the police force. To give a simple example, until not long ago (before the dictatorship) judges did not prosecute members of the police for torture or homicide, even if all the evidence was on the table, because they felt that if they did, if they “tainted” a member of the force, they would never be able to order them to detain someone or to perform an inspection. This has changed since 1983 and is still changing; I mean, we are doing better, but the links between the two are still very strong. The police “knows” more than judges do, it “coerces” the judiciary and the legislative branch, and these branches think that they use the police,

but they fear it at the same time. This has created institutions (historically) with great autonomy and, for this reason, impervious to external controls.⁵⁵

During the 1990s, the problem of police violence became a central issue on the public agenda.⁵⁶ In response, civil society organizations (human rights organizations and those dedicated to issues of institutional violence) have contributed to improving the methods of controlling the members of these forces. However, there has not been substantial improvement regarding their responsibilities for state terrorism during the dictatorship.

IMPUGNING ELECTORAL POSTS

THE LEGISLATIVE BRANCH

Legislators can be impugned at two stages in Argentina. The first is when the lists of candidates are made official. The second stage is when the elected candidates are announced or the certificates [*diplomas*] are presented.⁵⁷ *Impugnacións* can be formulated by a member of the House of Representatives or a senator (designated or elected), the main governing body of a political party, an institution, or a person. Article 64 of the Constitution establishes that: “Each House of Congress is the judge of the election, the rights, and titles of its members in regards to their validity.”

When an *impugnación* is received, either the Commission of Petitions, Powers, and Regulations [*Comisión de Peticiones, Poderes y Reglamentos*] of the Chamber of Deputies or the Treaties Commission of the Senate is designated as the judging commission. The maximum period for dealing with these *impugnacións* is 90 days. The judging commissions must act within this period and their decisions must be presented before the plenum of the corresponding house.

There are “formal” causes for *impugnacións* that do not entail any type of controversy for the cases being dealt with here; for example, lack of compliance with any of the requirements imposed by each chamber (age, citizenship, and an address in the corresponding district), anomalies in the electoral process, or the existence of a nonappealable judgment for illegal activities. However, the authority of the chambers to reject the appointment of a member to that body of government, owing to a lack of suitability [*falta de idoneidad*] or to moral incompetence [*inhabilidad moral*], has been the subject of intense debate. The first issue under discussion is whether the authority of the

chambers to remove members displaying moral incompetence⁵⁸ can be extended to deny them access in the first place. The second issue—on which I will concentrate the bulk of my attention—concerns the definitions of suitability and moral incompetence.

A central debate concerning *impugnación* processes in Argentina has been the definition and reach of “suitability” requirements, apart from the specific competencies or abilities necessary for performing a given post. These discussions take as their starting point article 16 of the CN, which establishes that all of the inhabitants of the country are eligible for public posts or employment on no other condition than suitability. The Supreme Court has, however, stated that “the declaration that all inhabitants are eligible for employment without other condition than suitability does not exclude the imposition of ethical requirements.”⁵⁹ According to one constitutional expert, “the constitution does not establish specific contents regarding suitability, and for this reason, this must be judged according to current ethical standards. Without a doubt, among these standards, democracy must take primacy as a system for making effective and for protecting human rights. The constituting essence of democracy lies in the recognition, respect, tutelage, and promotion of human rights.”⁶⁰

It is in this sense that a relationship has been established between the application of the concept of suitability, according to article 36 of the CN, and the international human rights instruments incorporated into the constitution in 1994. After the 1994 constitutional reform, it has been argued that the Argentinean state has a constitutional obligation to take the necessary measures in order to remove from public posts those who have been responsible for human rights violations. Furthermore, meeting this obligation is a necessary condition for complying with the right to democratic institutions.⁶¹

Similarly, international human rights law considers the removal of officials involved in serious human rights violations to be an affirmative obligation of states and a guarantee of nonrepetition of the crimes of the past. In 1995, the Human Rights Committee of the United Nations recommended that, to be in compliance with the International Covenant on Civil and Political Rights, the Argentinean state should “establish adequate procedures in order to make sure that those members of the armed and security forces against whom there was sufficient evidence of participation in previous serious human rights violations are removed.”⁶² In 1999, the committee insisted to the Argentinean state that “measures should be taken in order to be assured that persons who participated in serious human rights violations do not continue to be employed by the armed forces or the public administration.”⁶³ Furthermore,

the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities has pointed out that one of the measures that must be adopted regarding the impunity of serious human rights violations is the “removal from their posts of high officials involved in the serious violations that have been committed.”⁶⁴

Access to electoral office has been impugned in the case of only two persons (one of them twice). Interpreting the National Constitution in light of the principles of international human rights law was the central argument used for impugning, on two occasions, former General Antonio Domingo Bussi, a high-ranking officer during the military dictatorship.⁶⁵ The first occasion regarded his certification as an elected representative, and the second as the candidate elected as governor of the province of Tucumán. On December 1, 1999, the APDH and a group of representatives objected to Bussi’s certificate as representative, pointing out his proven responsibility for serious human rights violations.⁶⁶ These objections were accepted by the Treaties Commission, which initiated the process of debating his certification as an elected representative, and formed the basis for his rejection.⁶⁷

Bussi’s defense disputed the legality of the *impugnación* process.⁶⁸ In its interpretation of article 64 of the CN and article 3 of the Regulations of the House of Representatives, the defense argued that there was no reason to proceed with the case, for the aforementioned article refers to the “elections, titles, and rights of the elected representative.” It stressed that there were no irregularities during the elections and that Bussi’s electoral certificate had been duly validated by the electoral courts of the province. It also argued that the formal requirements contained in article 48 of the CN, the nonappealable judgments by the competent judge, were the only possible criteria for annulment. Likewise, the defense appealed to article 23 of the Pact of San José, Costa Rica, which establishes the right of every citizen to vote and be elected.

Among other activities, the commission held a hearing on March 28, 2000, with human rights organizations and a citizen who had been a direct victim and who demanded to be heard.⁶⁹ In supporting the case against Bussi, these organizations stressed that the requirement of suitability had to be interpreted according to the spirit of the constitutional reform of 1994. Specifically, they appealed to article 36 of the CN,⁷⁰ which establishes the permanent disqualification for occupying public posts of those who had acted against the institutional order and the democratic system, and which links the health of the system with ethical conduct in public functions. In addition, they insisted on the superior constitutional hierarchy of pacts and international agreements. The APDH and CELS, in particular, contended that popular sovereignty is limited

by constitutional norms in force and fundamental rights. In its final report, the commission included the application of international norms with constitutional status, in particular the American Convention on Human Rights and the UN Covenant of Civil and Political Rights.

Bussi's case aroused much debate in the public domain. Some jurists agreed with an ethical interpretation of the concept of suitability, although only for "exceptional cases."⁷¹ Others stated that in no case could the houses expel their members for ethical violations committed before their election. Jonathan Miller, in a restrictive analysis, states that there is a distortion in interpreting article 64 in order to judge the suitability of an elected representative. According to him, the Constitution only refers to the "validity" of the titles. Citing the case of *Powell vs. McCormack*,⁷² quoted in the report, however, he states that a fair interpretation of this verdict underscores the impossibility of removing a representative due to questions not related to formal or legal requirements. Miller's main argument is that there is "extensive legal analysis on the history of the norm used for article 64 that leaves no room for using article 64 for judging the suitability of an elected representative, be it for a 'secular' judgment of his morals, or for any other judgment of his suitability."⁷³

There are also varying opinions regarding the application of international law. Méndez and Chillier have stated the importance of international law in the context of a lack of an explicit vetting or lustration norm in Argentina. "In the case of Guatemala," they argue, "there was an explicit constitutional norm of lustration that was applied by the agencies of the State in order to avoid that a member of the military who had participated in the coup d'état could access power through democratic means. In the case of Argentina, this norm is not a part of our body of law, and the adopted measure was elaborated based on principles of international law. . . . This void is a direct consequence of the policy of impunity exercised by the first two democratic governments."⁷⁴

However, there exists a broader discussion on the reach of obligations stemming from the decisions of the Inter-American Commission on Human Rights (IACHR) in nonjudicial processes. There is agreement that the American Convention on Human Rights and the decisions by the IACHR establish the obligations of the state to investigate, judge, and repair human rights violations. Miller's stance, however, is that "the international system has not sought to use a political process for fighting against human rights violations, but a legal process."⁷⁵ Other authors find that the international legal system clearly establishes the obligation of states to remove from their structures those responsible for serious human rights violations. Compliance with this obligation is a condition of respecting society's right to have democratic insti-

tutions in force. In this context, the decision by the IACHR regarding the Ríos Montt case constituted a positive precedent for measures of removal from public posts.⁷⁶

Bussi's certificate was rejected by the House of Representatives because his participation in crimes against humanity demonstrated that he did not satisfy the requirements of political morality necessary to hold a high post in one of the main institutions of the republic.⁷⁷ General Bussi then appealed to the judicial system. In this instance, the attorney general (*procurador general*), making use of a broad interpretation of the relevant constitutional principles, asserted Congress' power to decide on the quality of those who aspire to occupy one of its seats. This power, he claimed, is crucial to safeguard the independence of Congress, avoiding the interference of the other powers in the decisions of the legitimate representatives of the nation.⁷⁸ Bussi's judicial appeal, however, became moot once the period in which he would have been a deputy lapsed.

December 2005 saw the second case of this type of *impugnación*, when the Chamber of Deputies opened an evaluation of the suitability of former commissar Luis Abelardo Patti to be a member of the legislative. On October 23, 2005, Patti was elected deputy by the province of Buenos Aires. On December 6, 2005, as a result of a claim raised by three members of the Chamber of Deputies, that body did not allow Patti to be sworn in. The claim alleged that Patti had participated in the murder of two members of the armed group *Montoneros*, on May 14, 1983, and in the murder of José Gastón Goncalvez, whose incinerated remains had been found on April 2, 1976.

In March 2006, a commission was formed to analyze Patti's situation. After three months, during which the commission received testimony and collected evidence, it issued a majority decision against allowing Patti to become a member of Congress. Those who voted against the decision, and in favor of allowing Patti to take his seat, argued that no firm judicial sentences against Patti had been issued. On May 23, 2006, the Chamber of Deputies, in a plenary session, declared him unsuitable to occupy a congressional seat.

THE EXECUTIVE BRANCH

In the case of posts in the executive branch decided by election, the *impugnación* mechanism is different, although the discussions regarding moral or ethical suitability are the same. Electoral processes for the executive are regulated by the terms established in the national and regional constitutions; the National Electoral Code [*Código Electoral Nacional*] (CEN) and the regional

electoral codes [*códigos electorales provinciales*] (CEPs); regional electoral laws; and the Organic Law for Political Parties.

Although there are many differences in the provisions of each one of the regional sets of norms, in general it could be said that the first instance of controlling compliance with requirements for candidates are the political parties themselves. Carlos Fayt has stated that political parties have to comply with the principle of suitability, since this is something that can be required by the electorate.⁷⁹ Parties must present their list of candidates to a state authority that evaluates it and makes it official. In all cases, there is an administrative authority for the election (for example, a regional electoral commission), and there is always a competent judicial body to which decisions can be appealed.

In the case of elections for national posts, after each party prepares a list of candidates, it must present it before a national electoral judge. Article 60 of the National Electoral Code establishes that “parties will have to register the list of publicly-announced candidates before the electoral judge. These candidates must comply with the requirements for the post to which they are applying and will have to be clear of any legal cause for disqualification.” And article 61 establishes that “the judge will pronounce his resolution regarding the condition of the candidates, stating in a concrete and precise manner the grounds for his resolution.”

The official lists have to be made known to the National Electoral Commission [*Junta Nacional Electoral*], which has the authority to certify the winners of the vote count. The CEN establishes that the electoral judge of the first instance is the competent judicial instance, and the National Electoral Chamber [*Cámara Nacional Electoral*] is the body for appeals.

IMPUGNACIONES AND REMOVALS IN THE JUDICIARY

The National Constitution establishes that magistrates of the judicial branch are appointed by the president of the nation in agreement with the Senate. For this purpose, the president sends a file with each candidate’s record to the Treaties Commission of the Senate. Since the reform of the National Constitution in 1994, the judges of the lower federal courts are appointed “based on a proposal of three candidates presented by the Council of the Magistracy [*Consejo de la Magistratura*], in agreement with the Senate, during public session, in which the suitability of the candidates is considered.”

In compliance with article 114 of the CN, Law 24.937⁸⁰ was passed in 1997, establishing the Council of the Magistracy, which is authorized to select the

magistrates and administrative members of the judicial branch. The council is a permanent body of the judicial branch, comprising the president of the Supreme Court of Justice of the Nation [*Corte Suprema de Justicia de la Nación*] (CSJN), four judges of the judicial branch of the nation, eight legislators, four attorneys with federal license (elected by similarly licensed professionals), a representative of the executive branch, and a professor of law at one of the law schools at the national universities (also elected by vote).

In 2003, a presidential decree and the reform of the Regulations of the Senate introduced new and important amendments regarding procedures for appointing judges of the CSJN and other judicial officials. With Decree 222/03,⁸¹ the executive branch established guidelines for the nomination of these judges and ordered a new procedure.⁸² According to these, the president must make public a list of up to three candidates for each post and an inquiry must be held in order to consult citizens on the technical and moral capacity of the candidates, as well as their commitment to democracy and human rights. After this inquiry is completed, the proposal for candidates, together with the observations provided by civil society, must be sent to the Senate to be debated in a public hearing.

This decree was based on a proposal made by five nongovernmental organizations, published in the text “Una Corte para la Democracia” (A court for democracy).⁸³ All of these organizations have been systematically working on issues regarding accountability and public disclosure as well as judicial reforms. This document contains “proposals for changes in the appointment and removal processes of judges of the Supreme Court, the reduction of the jurisdiction of this court, and other ideas aimed at recovering credibility, legitimacy, and the trust of the people in this institution, which must be the guarantor of individual freedoms and the proper functioning of the democratic system.”⁸⁴

At the same time, the reform of the Regulations of the Senate in 2003 established in great detail the system of publicizing the agreed-upon lists of candidates for judges, and broadening the opportunities for civil society to make observations about them. But it also stipulated the right of reply by the candidate to observations that may have been posed. It also allowed the Treaties Commission to produce evidence. A fundamental part of this reform was the incorporation of public hearings into the process. After December 2002, an intense debate took place on the reform of these regulations, which, in a first resolution, failed to include public hearings for agreements on the candidates for magistrates. Finally, however, public hearings were incorporated into the amendments of 2003 and were established in article 123.

The process of removing judges was also changed with the reform of the CN in 1994. Prior to this reform, the established mechanism was a political trial in which the House of Representatives made an accusation and the Senate reached a resolution.⁸⁵ Since this reform, and regarding the removal of judges of lower courts, any citizen can file a suit before the Council of the Magistracy. The ruling produced by the council is nonappealable and has no other effect but the removal of that judge. The removed judge, however, is subsequently subject to the law before the ordinary courts. This procedure incorporates in a positive manner the principle of participation by various actors in relation to justice. Regrettably, however, the process has become very bureaucratic and, as a result, the control of these actors is not entirely effective. Sustainable and effective judicial reform depends on the proper functioning of this process.

IMPUGNACIÓN: POLITICAL OR LEGAL?

An ongoing debate in Argentina, since the transition to democracy began in 1983, concerns whether the agreements for military promotions are political or juridical in nature. The legislators who seek to approve the agreements argue that there are no judicial proofs that validate the questionings, and that, therefore, the promotions should go through unhindered. According to this line of thinking, the courts would have to provide objective, legal proof; in the case that there is none, the *impugnacións* would violate the principle of presumption of innocence. The following dialogue provides an example of such a discussion in Congress:

Mr. Usandizaga: Mister President, as I have stated on more than one occasion in previous cases not related to these agreements—and with no intention of provoking controversy with anyone—I am very respectful of the constitutional principle that establishes that in order for someone to be guilty of a crime, he or she has to have been sentenced by a previous judgment ruling over the issue at hand. Constitutionally, our country is ruled by what is known as the principle of presumption of innocence. This means that there can be accusations or accusers, but if there is no sentence in the end, no one can be punished. This is why I vote in favor in these cases. My intention is not to argue with anyone, but to observe a principle that I have always respected in all votes of this nature. That is, the principle of presumption of innocence rules our country by constitutional mandate. It is in this sense that I am voting.

Mr. Del Piero: Mister President, the intervention by the Senator for Santa Fé urges me to make the following clarification. I am not making any value judgment or condemning anyone. I am merely offering my agreement or not with the National Executive branch regarding the confirmation of the higher ranks of the Armed Forces. In order to make my vote, I have taken into consideration the record of suitability of the candidates being proposed. My vote against this specific case on the agreements we are considering is based, above all, on my personal evaluation of the moral competence displayed in the records of the proposed officials, who participated in the “Dirty War” [*Guerra Sucia*] during the period between the years of 1976 and 1982. Henceforth, regarding the case of the promotion of Lieutenant Colonel Alejandro Guillermo Duret—to my knowledge, he is the one being dealt with here—I place my vote against on the record.

Mr. Verna: Mister President, inasmuch as this case is included in the report by CONADEP with file number 7.594, I announce my vote against. Likewise, I wish to state the following: the agreement is, in addition, a political issue because it is resolved within a political body whose reputation may be affected, positively or negatively, according to its decision. Due to this political nature, these cases must be analyzed neither with the juridical rigor of a magistrate, nor with the technical criteria of a qualifications commission, but with an understanding of the affirmation of values that our society needs.⁸⁶

According to regulations, it is clear that decisions by the Senate do not need previous court sentences. As stated above, the rejection of a promotion is a political decision that only halts a military career; it does not take away the acquired rights of whoever is not being promoted. More than being guided by legal-institutional matters, the course of these discussions was determined by the need of the branches of the state to provide a response to policies concerned with dealing with problems regarding the military in general. In other words, these arguments mainly circled around the balance of forces in civic-military relations and the limits of the political autonomy and the corporate features of military institutions.⁸⁷

Criticism of the political character of *impugnacións* has also surrounded their application to posts decided by election and the removal of magistrates, again as a result of the lack of legal decisions from the courts on serious human rights violations. CELS stated the following in the context of the Patti case:

International human rights law imposes an inversion of the burden of proof [in cases such as this one] which involve serious human rights violations. Indeed, those persons accused of committing such crimes must prove their suitability, even more so in cases like the present one, in which the suspect intends to occupy a post of such importance.... A person who depends on the state apparatus itself [in order to commit crimes] cannot hide behind the lack of diligence in the clearing up of the facts by the State itself.⁸⁸

CELS has argued in favor of departing from the requirement of having “a firm judicial sentence,” in order to assess the ethical or moral suitability of the members of Congress, for these extraordinary cases involving grave human rights violations such as forced disappearance, torture, and genocide. Its position is that the rule for access to and permanence in public positions laid out by the Human Rights Commission in relation to the case of Argentina, a rule containing the criterion of a “reasonable suspicion judicially declared,” or of “sufficient proof of participation,” is the proper evaluation tool for assessing the suitability for occupying public positions. Its exceptional character is a function of the peculiar gravity of the situations to which it is meant to apply, the material and legal impossibility of competent tribunals carrying out timely investigations. In other words, the impunity suffered by the country in the last twenty years of democracy motivates the appeal to extraordinary criteria in order to enforce the principles of justice contained in international human rights law.

The Electoral Commission of the Province of Buenos Aires, acting on a different view, however, on October 19, 1999, resolved that:

The evaluation of the facts presented by the impugning party is subjective, so long as there is no court resolution that, in the face of lack of compliance with the law or commission of an act typified as a crime, gives ground to a challenge. All of the facts being denounced have not merited a court judgment that can validate the circumstances described in writ of Fs. 1/8, and have not merited a criminal sentence that implies moral or ethical condemnation.⁸⁹

The *impugnación* of this candidate did not lead to his exclusion despite the ethical and suitability requirements that must be complied with in order to occupy posts that entail great public responsibility.

CONCLUSION

The core of the Argentinean democratic transition has been defined by Stanley Cohen as a process dealing with “legal and political limitations to implementing the principle of accountability.” The problem is, however, that the very concept of “transition” takes on a specific meaning here, because the “Argentinean case is the history of a process of impunity that has developed gradually.”⁹⁰ This process has been ongoing for more than twenty years, and it altered not only the institutional and political possibilities to confront the crimes of the dictatorship, but also the contents of the ethical debate, as well as the chances of transforming the armed forces into a democratic institution. The absence of a sustained public policy to fight impunity has contributed to undermining the conditions that make life in democracy possible.⁹¹ Arguably, for instance, the continued systematic practice of violence and torture by the security forces results from a lack of institutional mechanisms to democratize them.

The achievement of justice is crucial in order to have armed forces committed to democracy. In this sense, an important step in the direction of investigating and judging those responsible for the crimes of the dictatorship was taken by the Supreme Court when it decided, in the 2005 *Poblete-Hlaczik* case, that the Due Obedience and Final Stop laws were unconstitutional. Similarly, some measures taken since 2003, among them, retiring a significant number of the military upper echelons due to their antidemocratic postures, the repeated repudiation of the dictatorship on the part of the chiefs of the three branches of the armed forces, and the decision to remove the portraits of the dictators Jorge Videla and Reynaldo Bignone from the walls of the Military Academy, have had some impact.

The state has the obligation to provide just reparations and guarantees of nonrepetition. In order to do so, it may establish ad hoc mechanisms, and carry out institutional reforms leading to the separation from the armed and security forces of those linked with the grave violation of human rights. These ad hoc mechanisms could include administrative proceedings that would provide the possibility of producing evidence against and removing from their posts those individuals for whom there exists reasonable suspicion of responsibility for human rights violations under the dictatorship. For example, the state could create an evaluating commission to investigate the past behavior of members of the military, police, and security forces. This would considerably improve the quality of the membership of these institutions. This special administrative procedure—according to the rules of due process—will have to provide adequate judicial control over administrative decisions.

Current laws would actually allow various forms of these ad hoc screening procedures without the need for carrying out legal reforms. However, there are imperative reforms needed to the norms that rule military careers so that they (1) integrate verification and screening procedures and separation from duties when there are suspicions of participation in these types of crimes, and (2) modify the executive's discretion in presenting candidates for positions and promotions, requiring the executive to motivate and ground its requests. Some of the norms that currently govern the life of the armed and security forces were adopted during the dictatorship, and clearly, they call for thorough revision. The adoption of norms specifically barring holding an official position for reasons of grave violations of human rights during the dictatorship could actually improve the debate about the moral or ethical requirements of suitability for office. This would cohere with the Law on the Ethics of Public Function [*Ley de Ética en el Ejercicio de la Función Pública*], which established that all state functionaries stand under the obligation to "strictly observe and see to it that the National Constitution, the laws, and rulings are observed, and to defend the republican and democratic system of government."⁹²

Discussions such as those concerning Antonio Bussi's certificate and Luis Patti's candidacy demonstrate that nonjudicial measures to remove public officials from their posts or to prevent their candidacy due to involvement in the crimes of the dictatorship generate much debate. Court decisions, presumably, would be less contentious, at least in part, by virtue of complying with certain guarantees.

Those working to reform and develop mechanisms in the administrative sphere will need to be mindful of the inevitable controversy they will awaken, and therefore must face two challenges: first, defining criteria for assigning responsibilities for past crimes and, second, ensuring that the reforms abide by democratic principles. These principles encompass far more than the specific issue of the crimes of the dictatorship; they include the participation of different institutions of public administration and civil society in decision-making processes, and the disclosure and provision of public access to information concerning the nature of those processes. These measures will make a contribution to the ongoing political debates about democracy.

Translated by Christian Gerzso.

NOTES

- 1 This paper was written under the supervision of Victor Abramovich, executive director of the Center for Legal and Social Studies [*Centro de Estudios Legales y Sociales*] (CELS) until 2005, and Carolina Varsky, director of the CELS Program on Memory and Struggle Against the Impunity of State Terrorism. The author would especially like to acknowledge the collaboration of Cristina Caiati, director of the documentation section at CELS, and of all the members of the working groups in the different programs.
- 2 Centro de Estudios Legales y Sociales (CELS), *Colección Memoria y Juicio. Introducción* (Buenos Aires: CELS, 1982).
- 3 Augusto Conte and Emilio Mignone, "El caso argentino: desapariciones forzadas como instrumento básico y generalizado de una política" (paper presented at the conference, "La política de desapariciones forzadas de personas," Paris, 1981).
- 4 For further reference on this subject, see Conte, "El caso argentino"; CELS, *Colección Memoria*; National Commission on the Disappearance of Persons [*Comisión Nacional sobre la Desaparición de Personas*](CONADEP), *Nunca Más. Informe de la Comisión Nacional sobre la Desaparición Forzada de Personas* (Buenos Aires: Editorial Universitaria de Buenos Aires [EUDEBA], 1984); CELS, *Terrorismo de Estado. 692 responsables* (Buenos Aires: CELS, 1986); José Luis D'Andrea Mohr, *Memoria Debida* (Buenos Aires: Colihue, 1999); and Jorge Mittelbach, *Sobre áreas y tumbas. Informe sobre desaparecidos* (Buenos Aires: Editorial Sudamericana, 2000).
- 5 For an in-depth treatment of this subject, see Eduardo Blaustein and Martin Zubieta, *Decíamos ayer: la prensa argentina durante el proceso* (Buenos Aires: Colihue, 1998).
- 6 This behavior continued after the democratic transition with the refusal to provide information. The judicial branch (with few exceptions) rejected the petitions for habeas corpus filed by the families of victims and repeatedly limited the possibility of carrying out judicial investigations.
- 7 Emilio Mignone, *Derechos Humanos y Sociedad. El caso argentino*, Ediciones del pensamiento nacional (Buenos Aires: CELS, 1991), 70.
- 8 "On July 28, 1979, 13 days before the official entry and search of [humanitarian] organizations, police agents had confiscated, at the Alemann y Cía. printing house, 4,000 copies of a pamphlet called 'Dónde están los 5,581 desaparecidos' (Where are the 5,581 disappeared persons?) that the Permanent Assembly of Human Rights was printing at the time, and that had been prepared by the Ecumenical Movement of Churches for Human Rights, the Argentinean League for Human Rights, and the Families' Commission" (CONADEP, *Nunca Más*, 426).
- 9 *La Nación*, August 3, 1984 and *La Voz*, March 8, 1984.
- 10 In order to understand the importance of making official documents public, it is useful to bear in mind the numbers that were revealed after documents by the U.S. State

Department were declassified. In 2004, for example, a document by a secret agent of the Chilean National Intelligence Directorate [*Dirección Nacional de Inteligencia*] (DINA) was made public, which mentions a total of 20,000 victims.

- 11 Marcelo Saín and Valeria Barbuto, "Dossier: Las Fuerzas Armadas y su espacio en la vida democrática," in *Informe Anual sobre la situación de los derechos humanos en Argentina, 2002 (hechos enero–diciembre 2001)*, (Buenos Aires: Editorial SXXI—Catálogos, 2002), 499.
- 12 Law 23.554 of National Defense, published in the *Official Gazette* on May 5, 1988.
- 13 Law 24.059 of Internal Security, published in the *Official Gazette* on January 17, 1992.
- 14 Law 25.520 of National Intelligence, published in the *Official Gazette* on December 6, 2001.
- 15 Decree 158/83 of December 12, 1983, published in the *Official Gazette* on December 15, 1983.
- 16 Decree 187/83 of December 14, 1983, published in the *Official Gazette* on December 19, 1983.
- 17 Human rights organizations had demanded the creation of a parliamentary commission, with the authority to access documentation and summon people to give testimony, but this was not to be.
- 18 The competence of military tribunals to conduct trials was established through Law 23.049. In this way, the government pretended to pursue the strategy of prosecuting the main responsible parties and guaranteeing at the same time the stability of the regime. In response to pressure from civil society, the possibility of appealing the sentences before the civil courts was incorporated into this law. It was provided that these courts could undertake the process at any stage, in case the military delayed trial proceedings without justification. Just a few months after the processes were initiated, CONSUFA ruled that the orders given during the "exercise of the fight against subversion" were "undeniably legitimate." The investigations did not prosper and, hence, the government's strategy for "self-cleansing" failed.
- 19 Four commanders were absolved because the evidence against them was insufficient and inconclusive.
- 20 CELS—America's Watch, *Justicia y verdad en la Argentina. Actualización* (Buenos Aires: CELS, 1991), 46.
- 21 *Ibid.*, 48.
- 22 Law 23.492 of Final Stop, promulgated on December 24, 1986 and published in the *Official Gazette* on December 29, 1986.
- 23 Law 23.521 on the Establishment of the Reach of Due Obedience, promulgated on June 8, 1987 and published in the *Official Gazette* on June 9, 1987.
- 24 Pardons were granted in 1989 and 1990.
- 25 Laws 23.492 (Final Stop) and 23.521 (Due Obedience) are publicly known as "impunity

- laws,” because they shut down the penal processes that were already underway, they left free most of the accused members of the military in these processes, and they limited the possibility of initiating new accusations. The courts have also named them “impunity laws” in many judgments, such as those of the National Chamber of Appeals on the Criminal and Correctional Matters of the Federal Capital [*Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal*] in 2001.
- 26 There is no exact figure of persons benefiting from the impunity laws and pardon. According to information published by the Families of Disappeared Persons and Detainees for Political Reasons [*Familiares de Desaparecidos y Detenidos por Razones Políticas*] in 1990, the number of persons absolved thanks to the Final Stop law was 730; 379 were absolved thanks to the Due Obedience law; and 43 were absolved by the Supreme Court of Justice. Pardons in 1989 benefited 7 sentenced persons and 36 persons being prosecuted.
 - 27 Article 75, clause 22 of the CN, incorporates the following pacts and conventions: the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; and the Convention on the Rights of the Child. In addition, article 75 allows the incorporation of other treaties, as would happen after the reform with the incorporation of the Inter-American Convention on Forced Disappearance of Persons and the Convention on the Non-Applicability of the Statute of Limitations to War Crimes and Crimes Against Humanity.
 - 28 Cases Num. 761 (investigating events that occurred in the Navy Mechanics School [*Escuela de Mecánica de la Armada*]), Num. 450 (investigating events that occurred in the jurisdiction of the I Army Corps [*I Cuerpo del Ejército*]), and Num. 44 (investigating crimes that were committed in the territory under the command of General Ramón Camps). Cases were also initiated to investigate the responsibility of civilians involved in the crimes perpetrated by state terrorism, including the collaboration of factory CEOs of Mercedes-Benz and Ford Motor Company in the kidnapping and later disappearance of workers and union delegates at these companies.
 - 29 These numbers are as of June 2006.
 - 30 Jonathan Miller, “Soluciones imperfectas en una democracia imperfecta,” in *El caso Bussi. El voto popular y las violaciones a los derechos humanos*, ed. Jorge Pedro Busti et al. (Buenos Aires: Imprenta del Congreso de la Nación, 2002), 31.
 - 31 Article 70 of Regulations of the Honorable House of Senate of the Nation.

- 32 Article 22 of Regulations of the Honorable House of Senate of the Nation.
- 33 An exception to this rule has been the public hearings conducted for the selection of judges accepted since 2003.
- 34 Article 99 of Regulations of the Honorable House of Senate of the Nation.
- 35 Changes in the ways in which civil society has participated in the process of the promotion of members of the military will be dealt with in greater detail in the following sections.
- 36 Interview with María Cristina Caiati, director of the CELS documentation section [*Área de Documentación*], October 24, 2003.
- 37 Grandmothers of Plaza de Mayo [*Abuelas de Plaza de Mayo*], APDH, CELS, Families of Disappeared Persons and Detainees for Political Reasons, Argentinean League for the Rights of Man [*Liga Argentina por los Derechos Humanos*], Mothers of Plaza de Mayo — Founding Group [*Madres de Plaza de Mayo — Línea Fundadora*], Ecumenical Movement of Churches for Human Rights [*Movimiento Ecueménico de Iglesias por los Derechos Humanos*], and Peace and Justice Service [*Servicio Paz y Justicia*].
- 38 *El Clarín*, August 2, 1984.
- 39 For more information on this subject see Horacio Verbitsky, *Civiles y Militares. Memoria secreta de la transición* (Buenos Aires: Editorial Sudamericana, 2003).
- 40 An example of this was Colonel Mohamed Alí Seineldín, a member of the military who was impugned by human rights organizations but promoted in 1984. In 1985, Alfonsín's government appointed him military attaché for the Argentinean Embassy in Panama. Only after having participated in an insurrection at a military base in December 1990, an action against Carlos Menem's government, was he incarcerated and subject to trial. Colonel Antonio Fichera, impugned for having been the chief of the army unit in charge of many clandestine detention centers, provides another example. During Alfonsín's term, he was a high-ranking army chief, a post that he abandoned in Holy Week of 1987 after the military uprising that called itself *carapintada* (painted face). In October 1992, he was appointed to a post in the Ministry of Defense. In 1997, Menem's government accepted his resignation after a document on the defense and security of Mercosur, which considered military participation in controlling social conflicts in the region, was made public.
- 41 ESMA was a clandestine detention center during the last military dictatorship. After the transition to democracy, it became a symbol of the repression.
- 42 "Pernías and Rolón felt abandoned by the navy, so they decided to talk, provoking a chain reaction. Up until then, the members of the military had denied the facts and discredited the witnesses, whom they accused of advancing their cause against the armed forces by other means. Pernías acknowledged that torture had been the chosen weapon for a lawless war; he also confirmed the participation of the Navy in the kidnapping and murder of the French nuns, and even suggested that the *palotino* monks had been

- assassinated by the Federal Police. Rolón was more elliptic in his statements. He said that under no circumstances would he have given orders like the ones he received and that they were 'wrong'; however, they had been given by 'high officials who were now admirals endorsed by the Senate.'" Horacio Verbitsky, *El vuelo* (Buenos Aires: Planeta, 1995), 13.
- 43 In 2001, Pernías was detained by Judge Bonadío during a case on disappearances and confiscation of assets. On that occasion, Pernías justified his actions again and complained before the magistrate that he was being judged "not as former combatant, but as an ordinary criminal." *La Nación*, August 22, 2001.
- 44 Letter from CELS addressed to Senator Horacio Zalazar, president of the Treaties Commission of the Honorable Senate of the Nation, November 26, 2001.
- 45 *Habeas data* is a legal action provided by the Constitution that enables citizens to control the content of information on their personal record in public and private databases that have "the purpose of providing information." The aim is the protection of their privacy and access to information.
- 46 From the standpoint of CELS, it is not insignificant that the filing of these petitions was preceded by a series of events including: the well-known suit brought by the organization seeking the annulment of the laws of Due Obedience and Final Stop; the well-known preparation of a case concerning the execution of a group of political detainees in 1976, in which the commander of the army had been involved; and, in the social arena, the preparation for the public acts commemorating the twenty-fifth anniversary of the coup d'état.
- 47 According to INFOBAE newspaper, on September 12, 2003, General Bendini said, among other things, that: "Some small Israeli groups disguising themselves behind the 'curtain' of tourism and some nongovernmental organizations have designs on Patagonia and the coast for their water and oil reserves" and that "the systematic kidnapping of babies never happened. Current trials against members of the military who participated in illegal repression will make the armed forces participate in a 'great circus.'"
- 48 This procedure and the complete report of the investigation were never made public. In addition, all the members of the investigating commission were lower-ranking military men, which compromised the independence and impartiality of the commission.
- 49 *La Nación*, May 27, 1996 and July 7, 1996.
- 50 There was a record in the courts as well, since he had been identified by a former repressor in an unsworn statement in 1985.
- 51 Jesús Rodríguez and Federico Storani on behalf of the Radical Party [*Partido Radical*]; Representative Mary Sánchez, with Alfredo Bravo and Alfredo Villalba, for the *Frepaso* Party.
- 52 The laws regulating the Federal Police are the Organic Law (Law Decree 333/58), the Law of Personnel (Law 21.965), and Decree 1866/83. The Police of the Province of

Buenos Aires are ruled by Provincial Law 12.155 and Law Decree 9550/80. In order of seriousness, the established sanctions are: (a) warning, (b) arrest, (c) suspension, and (d) dismissal.

- 53 CELS and Human Rights Watch, *La Inseguridad Policial. Violencia de las fuerzas de seguridad en la Argentina* (Buenos Aires: EUDEBA, 1998), 21.
- 54 Interview with Sofía Tiscornia, anthropologist, director of the Political and Juridical Anthropology Working Group of the School of Philosophy and Letters, University of Buenos Aires, April 2004.
- 55 Ibid.
- 56 Among others, the following types of cases became matters of public interest: deaths and tortures in police stations; the disappearance of persons who had last been seen with police agents; unnecessary deaths during confrontations; accusations against police agents for their participation in criminal actions; and cases of corruption.
- 57 These diplomas are presented in the Senate and the Chamber of Deputies, which is why processes at this stage take place in either chamber.
- 58 Article 66 of the National Constitution.
- 59 Judgments by the Supreme Court of Justice of the Nation, 238: 138.
- 60 Germán Bidart Campos, *Los valores en la Constitución Argentina* (Buenos Aires: Editorial EDIAR, 1999), 88.
- 61 Juan E. Méndez and Gastón Chillier, “La acción del Congreso y las obligaciones internacionales de la Argentina en materia de derechos humanos,” in *El voto popular y las violaciones a los derechos humanos*, ed. Jorge Pedro Busti et al. (Buenos Aires: Imprenta del Congreso de la Nación, 2002).
- 62 United Nations Human Rights Committee, *Comments on Argentina*, CCPR/C/79/add. 46, April 7, 1995.
- 63 United Nations Human Rights Committee, *Third Periodic Report of Argentina*, CCPR/C/ARG/98/3, May 7, 1999.
- 64 United Nations Commission on Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, E/CN.4/Sub.2/1997/20, June 26, 1997.
- 65 Between 1975 and 1983, Bussi held high posts in the army that successively gave him jurisdiction over most parts of the country. Based on the filings, he has been accused of 680 forced disappearances of persons and numerous cases of kidnapping of minors. On October 24, 1999, he was elected as a national representative for Tucumán Province. This was his third successful election; he had already occupied a seat in the House of Representatives between 1993 and 1995.
- 66 He was accused of crimes of forced disappearance of persons, kidnapping of minors, and concealment and obstruction of the administration of justice due to his lack of cooperation in the truth trials.

- 67 The commission rejected one *impugnación* for false testimonies under oath and unjust enrichment. This decision was taken by virtue of the norm that establishes that a non-appealable judgment on the crime being referred to in the *impugnación* is necessary in order to exclude a representative from holding a seat in the House.
- 68 Nevertheless, part of the defense dedicated itself to conducting an extensive analysis of the political process before and during the dictatorship. Its conclusion was the validity of the actions within the context of the repression.
- 69 The following organizations participated: Grandmothers of *Plaza de Mayo*, APDH, CELS, Families of Disappeared Persons and Detainees for Political Reasons, Children for Identity and Justice against Forgetting and Silence [*Hijas e Hijos por la Identidad y la Justicia contra el Olvido y el Silencio*] (HIJOS), Argentinean League for the Rights of Man, Mothers of *Plaza de Mayo*—Founding Group, Mothers of *Plaza de Mayo* Association [*Asociación Madres de Plaza de Mayo*], Ecumenical Movement of Churches for Human Rights, and Peace and Justice Service.
- 70 Incorporated during this reform.
- 71 *La Nación*, “La idoneidad moral para el acceso a cargos electivos,” December 10, 1999.
- 72 395 U.S. 486 (1969).
- 73 Miller, “Soluciones imperfectas,” 34.
- 74 Méndez and Chillier, “La acción del Congreso,” 56.
- 75 Miller, “Soluciones imperfectas,” 37.
- 76 See Méndez and Chillier, “La acción del Congreso.”
- 77 Former General Bussi then petitioned for the protection of his constitutional rights before the federal courts. His petition was rejected in the first instance and in the court of appeals. Judges declared that this was a “political issue not to be treated in the courts,” which entailed recognizing that this was a decision taken by Congress in which the judicial branch could not intervene without damaging the principle of the independence of the branches. However, the Supreme Court of Justice received Bussi’s demand and ordered the judge to pronounce a judgment on the case. It declared that this was a problem of guarantees over which the courts had to issue a resolution. December 10, 2003, would have been the expiration date of Bussi’s term, if his certificate had not been rejected. The courts could declare the case closed. However, at some point they would have to pronounce a judgment since the former general could sue the state for wages and retirement benefits.
- 78 Bussi, Antonio Domingo c/ Estado Nacional (Congreso de la Nación—Cámara de Diputados) s/ incorporación a la Cámara de Diputados, B.903, L. XL, Rex.
- 79 Carlos Fayt, “El sistema político democrático: presupuestos jurídicos,” in *El Derecho* 81, 849–53. Also see Germán Bidart Campos, *Tratado de Derecho Constitucional*, vol. 1 (Buenos Aires: Ediar, 1995), 263.

- 80 Sanctioned on December 10, 1997, published in the *Official Gazette* on January 6, 1998.
 81 Dictated on June 19, 2003.
- 82 A similar procedure, aimed at improving the selection of candidates for attorney general [*Procurador General*], general defense counsel [*Defensor General*], judges of the first and second instances, attorneys, and defense counsels, was stipulated in Decree 588/03.
- 83 Association for Civil Rights [*Asociación por los Derechos Civiles*] (ADC), CELS, Citizen Power Foundation [*Fundación Poder Ciudadano*], Environment and Natural Resources Foundation [*Fundación Ambiente y Recursos Naturales*] (FARN), Institute of Comparative Studies in Social and Penal Sciences [*Instituto de Estudios Comparados en Ciencias Penales y Sociales*] (INECIP), and Union of Users and Consumers [*Unión de Usuarios y Consumidores*].
- 84 Institutional letter, “Organizaciones de la sociedad civil celebran el nuevo procedimiento para la designación de jueces de la Corte Suprema,” www.cels.org.ar.
- 85 This procedure was used since 1992 by human rights organizations. In that year, Carlos Menem’s government undertook a judicial reform in which it created the National Chamber of Penal Annulments [*Cámara Nacional de Casación Penal*]. The position of this chamber within the judicial branch was right below the Supreme Court of Justice, as a body of appeals for some processes. In October of that same year, human rights organizations impugned before the Treaties Commission 7 of the 13 attorneys proposed for the chamber, due to their links to the dictatorship.
- 86 Typed version of 6th Reunión—2nd Sesión ordinaria—Senado de la Nación, March 15, 2000.
- 87 For further reference on civic-military relations in Argentina, see “El ‘Libro Blanco de la Defensa Nacional’ en la Argentina. Logros y desafíos de la política militar argentina en los comienzos del milenio,” Fifth Annual Research and Education in Defense and Security Studies (REDES) Seminar, Center for Hemispheric Defense Studies (CHDS), Brasília, Brazil, August 7–10, 2002.
- 88 The following parts of his judicial record were presented: a case for kidnapping and assassination during the dictatorship, another for illegal judicial orders in 1990, and one for assassination in 1990. Even though there are many other accusations of human rights violations against Patti, in these three cases the evidence proved his responsibility in an incontrovertible manner. All of these judicial actions had been closed for formal reasons. In one case, a “temporary stay” was ordered, due to the fact that the judge did not have definite grounds for either his guilt or innocence. Other cases were closed due to the statute of limitations, after many judges delayed the investigations without justification.
- 89 Resolution of the Electoral Council of the Province of Buenos Aires, October 19, 1999.

- 90 Stanley Cohen, "Crímenes estatales de regímenes previos: conocimiento, responsabilidad y decisiones políticas sobre el pasado," in *Nueva Doctrina Penal. 1997/B* (Buenos Aires: Editores del Puerto, 1997), 584.
- 91 Méndez and Chillier, "La acción del Congreso."
- 92 Law 25.188 on the Ethics of the Exercise of Public Functions [*Ley de Ética en el Ejercicio de la Función Pública*] (promulgated on October 26, 1999), article 2, inc. (a).

CHAPTER 2

The Struggle for Lasting Reform:
Vetting Processes in El Salvador

*Rubén Zamora with David Holiday*¹

INTRODUCTION

To fully understand the social context of the vetting processes that took place in El Salvador in the early 1990s, following the conclusion of the twelve-year civil war, one must go back to the 1930s, for it was then that the system of authoritarian military domination was established, at the same time that the country's economic structure was modernizing. The 1930s crisis in world capitalism hit Salvadoran shores with unprecedented force. The national economy's dependence on coffee prices dragged the country down into one of its worst crises, calling into question the system of domination that had been ushered in by the liberal reform of the second half of the nineteenth century. The response of those in power was to turn over the management of state affairs to the military, which established itself permanently in government, first under the personal dictatorship of General Maximiliano Hernández Martínez, who ruled the country with an iron hand for thirteen years. His rule was followed by decades during which military control was institutionalized: the armed forces took over management of the state, setting up a political regime that combined the periodic use of systematically fraudulent control mechanisms with repression directed against those who did not accept military domination, and which was accompanied by a constitutionalist, anticommunist, and developmentalist rhetoric that allowed the opposition only limited space. Thus, for more than fifty years the military not only held power, but also enjoyed a level of impunity that placed its members above the citizenry at large.

In the early 1970s, this political arrangement faltered, as elections became less and less useful as an instrument for legitimating the system, and an armed insurgency arose and took the first steps to challenge the military government. The regime's response was to accentuate its dependence on repression, which not only spurred on the guerrillas both politically and numerically, but also worsened its own crisis of legitimacy. The stage for an armed confrontation

was set, and for the next twelve years, from 1980 to 1992, Salvadoran society was embroiled in an internal war in which the guerrillas argued the need for democracy and social justice, while the government claimed to be defending itself from what it considered an international communist conspiracy whose objective was to take over the country and install a dictatorship.

During the second half of the 1980s, it became clear that there was no prospect of a military settlement to the armed conflict, as conditions both domestically and internationally brought about a persistent stalemate. At the same time, the population was showing ever more palpable signs of weariness in the face of the armed conflict. The alternative of a negotiated solution began to look increasingly attractive for both the guerrillas, who had been talking about such an option for several years, and the recently elected conservative government, which needed to end the war in order to ensure the viability of an economic restructuring project based on the dictates of the “Washington consensus.”

Although its precise causes may be in dispute, the war’s climate of impunity and judicial dysfunction certainly inhibited its early resolution. In 1983, at the peak of the conflict, Judge Harold Tyler made the following assessment in a report to the U.S. secretary of state:

Intimidation and corruption of prosecutors, judges and juries are widespread, and a rigid legal system renders successful prosecutions all the more difficult. The military exerts a pervasive influence over the nation and...has sought to shield from justice even those who commit the most atrocious crimes.²

Eight years later, this analysis was viewed as still relevant by a RAND study prepared for the Pentagon and published on the eve of the final peace accord in 1992.³

In April 1990, both parties agreed to sit down at the negotiating table, with the intermediation of the secretary-general of the United Nations. Two years later, in January 1992, the parties signed the peace agreement that not only ended the armed conflict, but also contained a broad array of political reforms, which the UN secretary-general called a “negotiated revolution.” This set of accords constituted a political program for the most thoroughgoing democratization that Salvadoran society had undertaken since its independence. Although the document clearly pointed to the dual causality of the conflict, that is, both socioeconomic exclusion and lack of democracy, in practice, and as a clear expression of the limits of the negotiated solution, the

main focus was on political reform. The assumption was that socioeconomic changes would be addressed via the mechanisms of a democratic society.

Overcoming militarism, in respect to both military control of the government and subsequent human rights violations, was the key issue in the negotiations, as reflected in the proportion of the peace accords given over to these matters, and the meticulous detail of the commitments made therein. The result has been that, both institutionally and organizationally, the instruments of legitimate violence have been profoundly changed: the constitutional reform redefined the role of the armed forces (article 212), limiting it to the external defense of the country; and, accordingly, the police function, which was traditionally entrusted to the armed forces, was separated out, the police agencies were dismantled, and a new police force, the National Civilian Police [*Policía Nacional Civil*] (PNC), was formed. The national security doctrine in place up until that time was replaced by a new organic law of the armed forces, which deprived the military of its support network in the population by disbanding paramilitary organizations.

All these changes raised questions about the status and fate of armed forces personnel. How could it be ensured that the country would not return to a state of militarism? How could it be guaranteed that the armed forces personnel would be capable of implementing the peace accords and would operate within their new parameters? What was to be done to prevent impunity from again becoming a characteristic of military conduct? The peace accords addressed these questions by reducing the total number of forces, creating institutions to protect human rights, bolstering the independence of the judiciary and of the Office of the Attorney General of the Republic (entrusted with the prosecutorial function), establishing the Commission on the Truth in El Salvador (hereafter, Truth Commission) to analyze the most serious political crimes committed during the war, and establishing the so-called Ad Hoc Commission (hereafter, AHC). The AHC's sole function was to undertake the vetting of the officer corps of the armed forces, based on a three-pronged test: full respect for the rule of law, professional competence, and the capacity to operate in the new situation of peace.

The first section of this chapter will provide some background on efforts to vet the armed forces prior to the peace accords. The second section contains a more detailed study of the work of the AHC, and the other mechanisms mandated by the peace accords to reorganize the police apparatus and improve judicial accountability. The third section will address vetting efforts undertaken in recent years, which have responded mainly to domestic constituencies

and concerns, including groups seeking to promote the integration of El Salvador into the global economy as well as popular discontent with rising criminality. In El Salvador, attempts to produce mechanisms that will ensure democracy, respect for human rights, and accountability have moved from a primary focus on human rights abuses to being centered principally (though not exclusively) on weeding out corrupt and incompetent state functionaries. In this sense, the vetting reforms initiated with the peace accords have become institutionalized into broader concerns about the kind of accountability that should be in place in a democracy. As a final matter, this paper will examine two issues that deserve further attention: first, the legal and political issues surrounding the ten-year ban on political office recommended by the Truth Commission for the people mentioned in its report; and, second, a deeper analysis of the specific contextual reasons that might explain the partial success of the AHC.

VETTING MECHANISMS AND INSTITUTIONAL REFORM PROCESSES

VETTING PRIOR TO THE PEACE ACCORDS

By late 1979, the crisis of the authoritarian military regime was already in evidence. The government of General Humberto Romero, who had assumed the presidency in 1977, found itself trapped in a political dilemma: on the one hand, it faced a mounting grassroots antigovernment mobilization, backed and fostered by the guerrilla movement, to which its only response was a policy of stepped-up repression; and, on the other hand, it had to address the demands of Salvadoran society, of the international community, and in particular of the administration of US President Jimmy Carter, that citizens' human rights be respected. The issue was resolved by the military regime in a manner that had become traditional: a coup d'état. But this time the plotters called on the opposition to form a government, and pledged to withdraw to their barracks.

One of the serious problems faced by the new Revolutionary Government Junta [*Junta Revolucionaria de Gobierno*] was that of addressing the human rights violations committed under previous administrations, and, more specifically, the illegal executions and disappearances of citizens, both men and women, which had become a regular practice of the security forces and armed forces units. The government took a number of unofficial, discrete, and ultimately unsuccessful initiatives in this direction, such as offering money to ex-members of the intelligence apparatus of the military regime in exchange for

information about the burial places of the disappeared. It also officially set up a Special Commission for Investigating Political Prisoners and Disappeared Persons [*Comisión Especial de Investigación de los Presos Políticos y Desaparecidos*],⁴ made up of three civilians: the attorney general of the republic, the president of the National Commission for the Defense of Human Rights, and the former president of the same commission, a respected attorney. From the outset of its work, the special commission encountered hostility and a lack of cooperation on the part of high-level military officers; consequently, its members began to receive and document hundreds of complaints from citizens, and to visit places where clandestinely buried human remains had been found.

After several weeks of work, on November 28, 1979, the commission delivered its report to the government junta. The report, in summary, argued that the number of human rights violations committed by the armed forces, along with the high level of impunity enjoyed by the perpetrators, provided grounds for the conclusion that the illegal disappearances and extrajudicial killings were an official policy approved by the three previous administrations. The commission therefore recommended that criminal proceedings begin against the previous three presidents of the republic, their ministers and vice-ministers of defense, the chiefs of staff of the armed forces, and national directors of the three police agencies that existed at that time. This “vetting” effort was ultimately fruitless, as it was overtaken by other events. Although the junta, on December 5, agreed to publish the commission’s report and ordered the attorney general to open a criminal case against those named in it, by Christmas a government crisis between the majority of civilian members of the junta and the cabinet and the high command of the armed forces was sparked by an increase in human rights violations. The crisis culminated in early January 1980 with the resignation of the cabinet and two of the five junta members. The new ruling junta, made up of members of the military together with the Christian Democratic Party, shelved the commission’s recommendations.

The failure of this experience clearly points to the limitations of a vetting instrument designed in an improvised fashion and used in conditions of political instability, including, especially, the weakness of the powers that put it in place. The first government junta (October 1979 to January 1980) was characterized by a lack of coherence, trying to defuse a highly polarized situation at the same time that it introduced a very radical program of socioeconomic reforms. It was clear that the measures being proposed by the commission were unprecedented, and required a degree of power that the junta never had. Moreover, the commission’s mandate was extremely vague with respect to its operations, powers, and available material resources.

A second “vetting” effort came two years later, in December 1983, when the U.S. government, concerned about the unfavorable reactions in Congress to its military assistance program, which were provoked by the increase in death-squad activity, sent Vice-President George Bush to San Salvador with a list of active-duty officers who, in view of the U.S. government, were involved in organizing and directing death squads. The United States demanded that these officers be relieved of their command duties and exiled, offering in exchange a more-than-substantial increase in military equipment.⁵ The result was a limited effort to carry out an internal vetting process in subsequent months, in which most of those on the list were retired. Nonetheless, extra-judicial executions continued to be the usual (albeit less-frequent) practice of the armed forces.

VETTING AND THE PEACE ACCORDS

The 1992 peace accords can be read as a program for democratizing a society that for more than fifty years had experienced authoritarian military rule, not by replacing but by reforming the institutional framework put in place by the previous regime. At the same time, the peace accords reflected the balance of military force between the parties to the conflict, in which neither side (nor their allies) could claim victory over the other. Accordingly, the negotiated settlement implied certain restrictions on the democratization program, and, more concretely, on the necessary demilitarization of politics. The most basic of these restrictions concerned the main actors in the conflict: the armed forces would continue to exist, albeit in a modified form, and the Farabundo Martí National Liberation Front [*Frente Farabundo Martí para la Liberación Nacional*] (FMLN), though shed of its weapons and military structure, would become a legal political party.

From this perspective, the whole set of mechanisms proposed by the peace accords had a dual function: first, to introduce into Salvadoran society institutions and forms of democratic political coexistence; and, second, to prevent Salvadoran political life from falling back into the molds and forms of conduct that dominated it for so many years. Retribution was relegated to a second tier, and tended to be easily overlooked, allegedly out of considerations of political stability. As the accords were implemented, this view became even more predominant, and as a result transitional justice measures focused not on retribution, but on prevention. “Punitive” action was limited to a few exemplary cases, which were not of a judiciary nature. This approach is illustrated by the vetting mechanism that will be the main focus of analysis of this

chapter, the Ad Hoc Commission. With its target limited to the armed forces, and only the senior commanding officers,⁶ the commission's grounds for vetting included not only human rights violations (subject to criminal liability), but also the "capacity to adapt to the new situation," a typically nonjudicial consideration.

The peace accords contain three types of mechanisms that are relevant to the issue at hand: "total vetting," "direct vetting," and "indirect vetting."⁷ The first corresponds to measures that abolished an entire institution, or an entire part of one, its personnel being dismissed and sometimes forbidden from applying to the new, similar institution created by the accords, just for having been a member of the old institution.⁸ The second type, direct vetting, refers to the explicit mechanisms that evaluated the personnel of an institution to determine who should be separated from it. And, finally, indirect vetting refers to institutional reform measures requiring that personnel must be subject to new selection procedures in the future.

Four cases of total vetting followed the peace accords. The first was that of the combatant force of the FMLN, which was dissolved as such, its members being given the choice of continuing to participate in the political life of the country through a political party (with the help of a series of economic measures to integrate them into civilian life), or (for a minority of them) joining the new PNC, within the 20% quota to which the FMLN would have a right in the transition period.⁹ The second case was that of two of the three police corps that existed prior to the accords, the National Guard [*Guardia Nacional*] and the Treasury Police [*Policía de Hacienda*].¹⁰ These were abolished as the peace process began, and their members incorporated into the armed forces. The National Police [*Policía Nacional*] (PN) was accorded different treatment, as will be seen below, and was gradually replaced by the new National Civilian Police. In the third case, important units of the armed forces known as Rapid Deployment Infantry Battalions, which constituted the elite forces of the army but which were accused of the worst human rights violations, were dissolved, as it was considered that they "will not be needed in the new situation of peace."¹¹ Finally, the two official paramilitary entities, one known as *patrullas* (patrols) and made up of army reservists, and the other the civil defense forces created during the war, were also abolished. In the case of the latter, this was accomplished by decree and with no compensation to members; in the case of the *patrullas*, which were part of the armed forces reserves and traditionally had played a major role in the repression and surveillance of the rural population, it was done with an express prohibition on participating in "any function related to public security or monitoring of the population or the territory."¹²

Direct vetting was reserved for all the officers of the armed forces, either serving there or in the PN,¹³ and all the policemen in the PN. For officers who had served in the old PN, a system was established by which they could apply to the new PNC by fulfilling the requirements that it might establish for all aspirants, and being subject to “an evaluation of their conduct.”¹⁴ Both cases will be addressed in the next sections of this chapter.

Finally, indirect vetting covered the armed forces, the police, and the judiciary. In the case of the armed forces, the peace accords included a set of reforms that ranged from the institution’s doctrine to a new organic law, a new system for professional training of officers, and a set of preventive and promotional measures.¹⁵ Similarly, for the PNC, the peace accords went into great detail about a set of reform measures to be adopted to guarantee that the institution avoided falling into the vices of the past. A separate issue is the judiciary. As noted in the introduction, it was absolutely necessary that the judiciary be vetted. Nonetheless, this institution shielded itself behind the separation of powers recognized by the constitution, evading any possibility of scrutiny. The Supreme Court of Justice headed up this struggle, going so far as to threaten to declare the accords unconstitutional if they were used to intervene in its work. The solution to the problem was a set of constitutional reforms that would open the space for a potential vetting of the judiciary. First, a new independent institution, the National Judicial Council, was established to train, nominate, and propose the promotion and dismissal of judges.¹⁶ The idea was to improve the quality of judges and to place some limitations on appointments made by the Supreme Court, a practice considered prone to corruption. Second, although the National Assembly continues to be the body entrusted with electing the magistrates by a two-thirds majority, it has to choose from a list (of three for each opening) presented by the National Judicial Council.¹⁷

ARMED FORCES

Two transitory commissions were agreed to in the peace negotiations that would have an impact on the vetting of military personnel. Most widely known and documented is the UN-sponsored and staffed Truth Commission, which functioned for a nine-month period between 1992 and 1993 under a mandate to investigate “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.”¹⁸ The Truth Commission was empowered to carry out investiga-

tions and make “legal, political or administrative” recommendations—that the parties agreed would be binding—which could include “measures to prevent the repetition of such acts, and initiatives to promote national reconciliation.”¹⁹ Although the Truth Commission would also comment on judicial actors and other civilians, in the final peace accord document the parties referred to the commission the “need to clarify and put an end to any indication of impunity on the part of the armed forces, particularly in cases where respect for human rights is jeopardized.”²⁰

It is the lesser known and underexamined AHC, which vetted the military officer corps shortly after the peace accords were signed, that has been cited by one recent study on transitional justice as “the most notable recent example of lustration/vetting processes in a post-conflict developing country.”²¹ Additionally, this commission represents the first (and only) example of a Latin American military submitting to an external civilian review panel with the power to fire or transfer officers.

The agreement to vet [*depurar*²²] the military was reached in September 1991, late in the two-year-long peace negotiations that were finally completed in January 1992. The three members of the AHC were selected by the UN secretary-general in consultation with the two parties: the Nationalist Republican Alliance [*Alianza Republicana Nacionalista*] (ARENA)—government, and the FMLN—rebels). Two Salvadoran military officers were appointed as observers by the president of El Salvador. Unlike the Truth Commission, which was entirely comprised of international members and staff, the AHC was comprised entirely of Salvadorans. Not very much was expected of its findings, as the task itself was deemed too ambitious and dangerous, and, being composed of Salvadorans, the commission was seen as being vulnerable to pressures and reprisals from the army. It must be kept in mind that for the previous sixty years the military had decided the future of civilians; it was unprecedented for civilians to decide the professional future of military officers.

The initial agreement was broad and vague, and seemingly applied to the entire armed forces: “A process of purification of the armed forces is agreed upon, on the basis of a vetting of all personnel serving in them by an Ad Hoc Commission.”²³ The duties and mandate of the commission were further elaborated, however, in the final peace agreement signed on January 15, 1992, which said that the commission’s work should be carried out “within the framework of the peace process and with a view to the supreme objective of national reconciliation.”²⁴ Specifically, the commissioners were to take into account the past performance of each officer, including:

- (1) his record of observance of the legal order, with particular emphasis on respect for human rights, both in his personal conduct and in the rigor with which he has ordered the redress and punishment of unlawful acts, excesses or human rights violations committed under his command, especially if there have been serious or systematic omissions in the latter respect;
- (2) his professional competence; and
- (3) his capacity to function in the new situation of peace, within the context of a democratic society, and to promote the democratization of the country, guarantee unrestricted respect for human rights, and reunify Salvadoran society.²⁵

“Serious deficiencies” in any one of these three areas would be sufficient cause for the commissioners to recommend the transfer or dismissal of personnel. The work of the commission was to begin shortly after the signing of the peace accords and to last three months, and its recommendations were to be implemented within sixty days of its report being issued. Although the wording of the mandate is not precise, it is clear that the commission was to look not at *all* of the members of the armed forces, but rather only at the officer corps.²⁶ Its recommendations were to be binding and non-negotiable.

The AHC was likely the most difficult point for the military to concede during the two-year process of negotiations. The military issue was the “Gordian knot” of the negotiations: the FMLN insisted that its troops and officers be incorporated into the armed forces, a demand the officer corps could not bear to accept because, it believed, to do so would amount to inviting the “enemy” into its house and would destroy the “professional character of the armed forces,” as well as the system of promotions [*tandas*] that was seen as the backbone of the institution’s stability. The impasse was overcome when both sides finally agreed to the separation of police functions from the military and the creation of a new, independent police force, and the FMLN dropped its original demand and accepted a quota in the new National Civilian Police.

The threat now posed to the military by the commission would be determined to a great extent by the people appointed to it, an issue so delicate that it was one of the very last details resolved in the negotiations. According to one of the key FMLN negotiators, Salvador Samayoa, so serious was the naming of these commissioners that it was only done at the eleventh hour, in the last few days of 1991, during final rounds of negotiations in New York City.²⁷ Although UN negotiator Alvaro de Soto worked from lists prepared by both the government and the FMLN, the government vetoed every

name on a list of fourteen prepared by the FMLN, while the FMLN vetoed only one name on the government list. The military's concerns were thus mollified by the fact that the government was effectively able to name the commissioners.

Three commissioners, "Salvadorans of recognized independent judgment and unblemished democratic records,"²⁸ were finally chosen. Reynaldo Galindo Pohl was an attorney and university professor who had participated actively in the military movement that overthrew General Salvador Castaneda Castro in 1948; he had been a member of the Revolutionary Government Junta, had chaired the Constituent Assembly that gave the country its modern constitution in 1950, had been minister of education in the first half of the 1950s, had begun work for the United Nations in the 1960s, and was respected and consulted by the Salvadoran military. Abraham Rodríguez, also an attorney, was a founder of the Christian Democratic Party and its first candidate for president, who in the 1980s, during the José Napoléon Duarte administration, had been in charge of relations between the president and the armed forces, working intensely with the top echelon of the officer corps. Eduardo Molina Olivares was a former Christian Democrat, who during the 1980s had been engaged in the defense of human rights and had worked for a negotiated solution to the conflict. The composition of the commission clearly reflected the supposed political alignment of its members: Rodríguez with the government, Molina Olivares with the opposition, and Galindo Pohl tied to the UN. In addition, the president appointed two high-ranking retired officers as observers, General Carlos E. Vides Casanova, former minister of defense, and General Rafael Humberto Larios, former chairman of the Joint Chiefs of Staff. The United Nations Mission in El Salvador (ONUSAL) provided the equipment for the work of the commission, while the salaries of the staff and all other expenses were provided by several Scandinavian governments, given that the commissioners accepted neither remuneration nor any kind of financing from the Salvadoran government.

The peace accords set forth the evaluation criteria and guaranteed that officers would be interviewed, but did not lay down any procedural guidelines. The commission, therefore, designed its own procedure, which can be summarized as follows:²⁹

- (1) The first decision was to not interview all the officers; the commission would limit its work to the three highest echelons of the corps, i.e., generals, colonels, and lieutenants, and only include captains if they were implicated in the course of the evaluations of their

- superiors. In the three months prescribed by the accords, it would have been practically impossible to evaluate the more than two thousand officers in the armed forces at that time.
- (2) The second step was to meet with more than four hundred officers (from captain to general) to provide them with a clear explanation of the commission's mandate and the procedures it would follow. At the same time, the commissioners asked for the officers' cooperation.
 - (3) The commission asked the Ministry of Defense to provide the "service sheets" [*hoja de servicios*] for all officers;³⁰ the ministry had sent photocopies, but the commission demanded the originals, and obtained them.
 - (4) The commission received all types of information with respect to the officers' conduct, from private sources and nongovernmental organizations, as well as foreign governments. The commission did not conduct any criminal investigations, but, rather, sought to form an opinion based on the information received and the interview with the officer.
 - (5) The interview with the officer proceeded based on the information in the possession of the commission. The interview format was uniform and sought to look not only into the events in which the officer was involved, but also at any relevant information regarding his responsibility for his subordinates' actions (chain-of-command responsibility), and above all the willingness he displayed to adapt to the new situation being ushered in by the peace accords. The interviews lasted from thirty minutes to one hour.
 - (6) Once the interview was over, the commission discussed the case and reached a decision as to whether to include the officer's name on the list of those who should be discharged or transferred. In every case the decision was adopted unanimously, even though only a majority was required.
 - (7) The two military advisers appointed by the president (a former defense minister and a former chairman of the chiefs of staff) attended all the interviews, but were not present when the commission deliberated on a decision. They were also not present when the commission made the final evaluation of the overall effort, nor at the ceremony delivering the report; in these two cases, the decision not to participate was made by the advisers themselves, even though their presence had been requested by the commission.

NATIONAL CIVILIAN POLICE

The creation of a new National Civilian Police (PNC) meant that a new conception of the public security function had to be developed. As defined by the peace accords, the PNC was to be “a new body, with a new organization, new cadre, new mechanisms for education and training, and a new doctrine.”³¹ Although recruitment remained open to former guerrillas and former members of the PN, the initial vetting of both was required. In the new regulations, special emphasis was placed on the institutional mechanisms set up for selecting new personnel as well as for ongoing accountability. Designed both as a measure for the demilitarization of society and as a measure of guaranteeing FMLN safety for reincorporation into civilian life, the development of the PNC has generally been hailed as one of the most important achievements of the Salvadoran peace process.

Under the peace accords, the National Public Security Academy [*Academia Nacional de Seguridad Pública*] was created as the only institution entrusted with the task of selecting personnel for the PNC, as well as training and carrying out annual evaluations of all PNC personnel. Additionally, an inspector general's office within the PNC was created that would investigate disciplinary cases of police officers. During the transition period,³² personnel were recruited from the public at large, but without discriminating against former PN or FMLN; on the contrary, according to the peace agreement, in the first promotions the FMLN could propose 20% of candidates from its own ranks, the government could do the same, proposing names from the old PN, and the rest would be chosen from candidates with no prior association with either. Former PN officers would be eligible after an evaluation of their conduct, which would be verified by ONUSAL. Former FMLN combatants who fulfilled the appropriate admission criteria and procedures were also eligible,³³ provided that ONUSAL could verify that they had “actually and irrevocably abandoned the armed struggle.”³⁴ These processes were also monitored by a domestic commission, the National Commission for the Consolidation of the Peace [*Comisión Nacional para la Consolidación de la Paz*] (COPAZ), which included representatives from the government, the FMLN, and political parties.

JUDICIAL BRANCH

Despite significant flaws in the Salvadoran judicial system, the peace accords themselves said little about judicial reform, much less about vetting of personnel. A working document on judicial reform prepared during the negotiations by the UN had included the immediate replacement of the Supreme Court and

the attorney general, as well as an evaluation process of the judiciary, but the FMLN had to forego these issues in favor of greater military reforms.³⁵ However, the periodic reports from ONUSAL, the UN special rapporteur on El Salvador, and the Truth Commission all suggested further reforms, many of which were never implemented.

The peace accords did provide for reforming the National Judiciary Council³⁶ [*Consejo Nacional de la Judicatura*](CNJ) to improve judicial independence and the quality of justice.³⁷ Among the new roles assigned to the CNJ were the periodic evaluation of the judges' professional competence at all levels below the Supreme Court³⁸ (albeit without the ability to act on these evaluations), as well as the ability to propose candidates for the Supreme Court, appellate and trial courts, and for justices of the peace. The CNJ has had a long-standing dispute with the Supreme Court over these issues,³⁹ however, reflected in part by the fact that its composition and role have been changed three times by the Salvadoran legislature in the past fifteen years.

VETTING AND POST-VETTING SITUATION

ARMED FORCES

The AHC, created by presidential decree, began functioning on May 19, 1992, and was originally set to last three months, although it was later extended for an additional month. Prior to its official opening, however, the commissioners prepared by renting office space, hiring staff (including a director, two lawyers, and support staff), and requesting initial information from the Salvadoran armed forces about the more than two thousand active members of the officer corps. The final report was submitted to President Alfredo Cristiani and the UN secretary-general on September 23, 1992.⁴⁰

Especially important to the commission's efforts was the work of El Rescate, an NGO founded by a group of North Americans and specializing in gathering information about the conflict in El Salvador. El Rescate created an index of accountability (beginning in early 1990) based on two sets of data: one that compiled all incidents of human rights violations reported by Tutela Legal (the human rights office of the San Salvador archdiocese, and the most reliable of local organizations), and a second one containing information on Salvadoran military structure and personnel, which was prepared over the course of more than a year by a graduate of the Salvadoran military academy. The human rights database covered 1980 through 1991, and included 15,212 records

of violations, of which 71% had only one victim. By cross-indexing these two databases, El Rescate was able to generate reports on individual officers that included violations committed during the time when an officer served in a command position of a major unit, department, or military zone.⁴¹

By mid-June, the commissioners had reviewed all the files and began a rigorous schedule of interviews, up to fourteen a day. The final report, delivered in late September 1992, was never made public,⁴² but soon the basic results were an open secret. The report recommended that 103 officers be transferred or dismissed, including nearly all of the members of the army high command, all the colonels who had command of troops during the war, as well as the minister and vice-minister of defense. In each case the commission only stated one or more of the three criteria—human rights record, professional competence, or ability to adapt to the new situation of peace—used to judge each officer. According to the peace accords, Salvadoran President Cristiani had agreed to implement these recommendations within sixty days. The U.S. and local press at the time, however, reported widespread discontent within the armed forces over the AHC recommendations, although declassified cables from the U.S. embassy now suggest that junior officers were not unhappy with the proposed changes.⁴³

The issuing of the AHC report also came at the most delicate of times in the implementation of the accords, with the final demobilization of FMLN and government forces scheduled for October 31. There were delays on both sides on a number of issues, the most crucial being that regarding land, and only with intensive diplomatic efforts by Marrack Goulding and Alvaro de Soto⁴⁴ on behalf of the UN secretary-general was a new timetable devised that would formally bring the armed conflict to an end by mid-December 1992. In the process, the UN secretary-general stipulated for the first time the synchronized nature of the accords, whereby “compliance with certain key points in the calendar by one side is contingent upon compliance with specific undertakings by the other side.”⁴⁵

In this context, the deadline for compliance with the recommendations of the AHC—which President Cristiani tried to renegotiate under apparent pressure from the military—came into play as part of a final struggle between the FMLN rebels and the Salvadoran government over implementation of the peace accords. By the final deadline at the end of December 1992, it became clear to the UN that the government had discharged or transferred all but fifteen of the officers on the list, including seven officers who had been sent abroad to diplomatic posts.⁴⁶ This led to a public rebuke from the secretary-

general on January 7, 1993, followed by an expression of concern by the Security Council on February 9, which also mentioned the failure of the FMLN to destroy its remaining arms. In fact, President Cristiani engaged in private negotiations with the FMLN during this period (to which the UN was not a party), resulting in two agreements—on December 22 and February 4—in which a series of issues were negotiated based in large part on the two remaining cards held by each side: the missiles still in the possession of the FMLN, on the one side, against a series of anomalies regarding land, the new police force, and reinsertion programs for the FMLN, on the government side.⁴⁷ The FMLN publicly and privately, however, had essentially agreed to allow Cristiani the latitude to discharge the final fifteen officers over the remaining months of his presidency, perhaps until as late as May 1994.⁴⁸

The publication of the March 15, 1993, report of the Truth Commission is generally credited with ensuring that the AHC recommendations would finally be completed. Whereas the AHC report was secret, and aimed at a relatively few top officers, the Truth Commission report provided a more systemic critique of the armed forces as a whole. Although far fewer military officers were actually named in the report (about fifty), the effect nonetheless was to give greater credence to the recommendations of the AHC. Many of those named had also been identified by the AHC report, most notably Minister of Defense Rene Emilio Ponce—key among the fifteen holdouts—for his role in the 1989 murder of six Jesuit priests, their housekeeper, and her daughter. Shortly after the release of the report, President Cristiani told the UN that the last fifteen officers from the AHC report, along with others named by the Truth Commission, would be retired from active duty by June 30 (some would leave with pay, to be retired at the end of 1993). By early July, the UN secretary-general said that the government was in “broad compliance” with the AHC recommendations. At least eight other officers who were not on the AHC list but were named in the Truth Commission report, however, managed to stay on in the armed forces for at least another year.⁴⁹ Of the AHC names that are known, only one former military officer named in the report currently holds public office, former Colonel José Almendáriz, a legislator from the center-right National Conciliation Party. In the 2003 elections, former Colonel Rolando Herrarte also ran for a deputy post with the Christian Democratic Party, but failed to win office. According to several officers consulted, most are retired or in private business, and not explicitly involved in politics.⁵⁰

The *depuración* of senior military officers in El Salvador was seen as an important component of the peace process, even though none of these offi-

cers expressed any repentance for past behavior or was ever brought before tribunals. In fact, it can be argued that, without the sweeping (and controversial) amnesty that was approved following the release of the Truth Commission report, many of the remaining fifteen officers might not have even left when they did.

More than ten years following the events described above, most analysts agree that the Salvadoran military is subordinate to civilian authority—even though a civilian is yet to be named as defense minister, the military is still largely autonomous in governing its internal affairs, and the military continues to play a minor role in internal security (largely due to the post-war crime wave) as well as intelligence gathering.⁵¹ During the presidency of Dr. Armando Calderón Sol (1994–99), a conflict erupted over the decision of the president to promote some colonels to the rank of general, disregarding the procedures established by the law; nevertheless, the military accepted the president's authority. More significant regarding the role of the military has been the separation of police functions from its charter, which has resulted in an extremely low number of human rights cases brought against it in recent years. Consistent with this reduced role is the armed forces' reduction in size, from some sixty thousand strong during the war to about fifteen thousand personnel at present. According to the human rights ombudsman, for example, in 2001 and 2002 only twelve complaints were made against the Ministry of Defense, three in 2002 and 2003, and eighteen in 2003 and 2004—out of about two thousand complaints lodged annually for all institutions.⁵² Given these statistics, it is not surprising that the armed forces rank highly in recent years among Salvadoran institutions as evaluated by public opinion polls.⁵³ Thus, while the *depuración* was an important symbolic component of the peace process, the redefinition of the military's role in society has been of arguably more long-term importance.

But the significance of the vetting of the high officers of the Salvadoran army can be seen when looked at from the perspective of the officer corps' long history of impunity. As stated before, this impunity, which stretched back to the beginning of the 1930s, was broken in a very discrete but dramatic way for officers who had seen their role as saving the country from the communist menace. Furthermore, it was done by a group of three civilians—one of whom was practically chosen by the military itself—and in a way that left the officers no chance to have their cases reviewed. For future generations of officers, the precedent was set; from that moment on, they would have to consider the possibility of being held accountable for their actions as military men.

NATIONAL CIVILIAN POLICE

The creation of a new civilian police service has been widely hailed as one of the greatest legacies of the peace process. In 2000, for example, the UN secretary-general recalled “the public security model ensconced in the accords, that of a rights-respecting, civilian-run force” that embodies “the country’s commitment to reconciliation, professionalization and the rule of law.” However, the secretary-general went on to note that, given the widespread criminality within the National Civilian Police (PNC) and its inability to root out these elements, “there are now serious indications of a departure from that public security model.”⁵⁴ Although still viewed favorably among police forces in Central America, and even increasingly within El Salvador, the continued problems faced by the PNC are traceable to flaws in the initial vetting processes as well as the more permanent mechanisms of selection, recruitment, and internal accountability.

In order to build a more professional police force, PNC candidates are required to meet psychological, physical, general knowledge, and educational requirements. During the transition period, the PNC was to be composed of up to 20% ex-FMLN, 20% ex-PN, with the remaining 60% civilians without previous involvement with either side. But as Charles Call notes, “both the government and the FMLN consistently showed a propensity to cheat on entrance requirements in order to ensure that their members would gain entry into the PNC.”⁵⁵ In the first months, for example, the government tried to pass an entire special forces battalion, one thousand Treasury Police, and eleven National Guardsmen (the latter two groups from security forces that were to be dissolved) into the PN so that they could then enter the PNC. In addition, there was no practical way of submitting applicants to a background check, because the old police records were completely unreliable, and, in the case of the ex-guerrillas, there was no documentation at all of their past behavior, aside from the difficult-to-obtain opinions of their immediate commanders. The FMLN was able to get some of its members in as civilians, and even members of youth gangs successfully entered the academy in the early years.⁵⁶ ONUSAL, however, was able to reverse most of these egregious violations of the peace accords.

A second serious failure in vetting occurred as a result of the December 1992 and February 1993 secret agreements made between the FMLN and the government, unmediated by the UN, which allowed for the full-scale transfer of the entirety of the Special Investigative Unit [*Comisión de Investigación de Hechos Delictivos*] (SIU) and Anti-Narcotics Unit [*Unidad Ejecutiva Antinarcóticos*]

(UEA) of the PN into the PNC. After minimal screening and no retraining, a number of ex-UEA officers took over command positions outside their area of specialization, over and above better qualified PNC officers who had gone through the academy, “becoming a corrosive, militarizing influence within the new force.”⁵⁷ In late 1993, members of the SIU were implicated in various criminal activities, including the assassination of a high-level FMLN leader. Only following this crisis was ONUSAL able to intervene to insist that ex-UEA and ex-SIU personnel would be required to meet standard admission requirements and attend the academy; but when the government agreed to these measures, the majority of both groups went on strike and ended up resigning en masse—a fortuitous, but unplanned, result of this new development.

These defective screening procedures for entering the PNC were complemented by weak internal disciplinary systems. The PNC’s internal system originally included a disciplinary investigative unit, a disciplinary tribunal, and a control unit, all supervised by an external inspector general’s office that operated under the vice-minister of security. The system was characterized by overlapping functions and an inefficient handling of an overwhelming number of cases. By early 1996, for example, almost half of the current police subcommissioners had been charged with disciplinary infractions, but two years later none of them had been dismissed.⁵⁸ In addition, the head of the disciplinary investigative unit reported in 1996 that the disciplinary tribunal rarely acted on his recommendations, and often suggested lighter punishments.⁵⁹

When PNC officers were implicated in high-profile kidnappings and robberies in 2000, Salvadoran President Francisco Flores took action and named a special commission (which included external actors) to review police personnel. This commission’s work resulted in the dismissal of some 329 officers by late 2000, but a second, more massive purge was authorized under Decree 101, issued in August 2000. Mid-level police personnel were asked to provide lists of *depurables* (those who should be dismissed); if they were unable to come up with any names, they risked being fired themselves.⁶⁰ Under this decree, 817 officers were dismissed, although the human rights ombudsman and other observers noted that these dismissals were carried out without respect for due process guarantees.⁶¹ Rachel Neild of the Washington Office on Latin America noted that:

Decisions were made at the discretion of the Director General [of the PNC], while the Inspector General was responsible for investigations. This placed the Inspector General under the Director General’s control,

thus voiding the Inspector's ability to act as an external control on the system.⁶²

The Organic Law of the PNC was then modified in late 2001, formally resulting in a loss of autonomy for the inspector general, placing that post under the PNC director, and institutionalizing the lack of due process for police accused of disciplinary violations. It remains to be seen whether these changes will result in greater internal controls for PNC officers. In 2003, for example, the inspector general reportedly processed some 5,039 PNC officers for disciplinary measures, of which 20% were for serious violations.⁶³ If accurate, this means that nearly a third of the entire police force was subject to some kind of complaint during the year.

Although the impartiality and fairness of these moves towards greater accountability may be of questionable seriousness, they have clearly had an impact on public opinion. In fact, former police chief Rodrigo Avila⁶⁴ has said that the disciplinary process was constructed to impact public opinion more than anything else, since it clearly violated the rights of the police themselves.⁶⁵ Indeed, while almost half of all human rights complaints lodged with the Office of the Human Rights Ombudsman are consistently against the PNC, its standing vis-à-vis public opinion has nevertheless increased. In 1996, 56% of those polled had "little" or "no" confidence in the PNC, while in 2001 this had decreased to 45% (although by November 2004 it had gone back up to 49%).⁶⁶

Most dismissed police have likely found employment in El Salvador's burgeoning private security sector, estimated at almost twenty thousand strong (and larger than the PNC itself). Although it is difficult to determine the fate of dismissed police officers, it is worth noting that a 1999 survey of prison inmates found that 22% had been members of the armed forces (which could include army as well as previous public security forces), while 6% were ex-FMLN guerrillas. However, of prisoners between the ages of twenty-six and forty, 44% were ex-combatants from one side or another.⁶⁷

The arbitrariness and externally-driven nature of the disciplinary procedures discussed here clearly illustrate the lack of real institutional development in the new police force. Internal and permanent procedures for maintaining a more or less clean police force did not function properly; they were understaffed, subject to pressures from outside and within, without a clear and consistent policy, and under weak leadership. As such, they opened the door to the development of noninstitutional procedures implemented more to satisfy public opinion than to build up a model police force.

JUDICIARY

Although efforts at vetting in the military and police have at least been attempted (with varying degrees of success), the judicial system has been a much more reluctant partner in reform. This urgent task is all the more complex because, unlike the police or military, which are subject to executive branch authority, the principle of judicial independence must be balanced against the need for evaluation and review of judges. Nevertheless, El Salvador has fallen far short of the mark, as the UN secretary-general noted in his five-year report on the peace process:

[T]he greatest failing in [the administration of justice] is the lack of efficacy in the process of vetting judges and officials who are dishonest, incompetent or whose motivation has failed them. The Supreme Court of Justice and the National Council on the Judiciary have evaluated judges in a manner and at a pace which have not proved adequate to the gravity of the situation. The inability to make more substantial and bold progress in this endeavour represents a failure to comply with an indispensable condition for the structuring of a system which, together with an efficient police, would be capable of eradicating impunity and guaranteeing justice.⁶⁸

Reforming the judiciary in the Salvadoran context also means depoliticizing it. As Linn Hamnergren has noted, “Supreme Court justices, along with the justices of the peace, were the two most critical judicial actors in the mechanisms for party competition—at the upper level they assured friendly judgments, and at the lower level they mobilized voters.”⁶⁹

The Truth Commission attempted to jumpstart this much-needed reform process by calling for the resignation of the entire Supreme Court and seeking to give the National Judiciary Council (CNJ) greater responsibilities for evaluation and oversight of judges.⁷⁰ Although the Supreme Court resisted this request—in an interview to a local newspaper, its president noted that “only God” could remove him from office⁷¹—the attention given to judicial dysfunction in the Truth Commission’s report nevertheless created a greater public sense of the need for reform. A new court was elected under a new procedure in 1994—giving the CNJ the ability to nominate half of the magistrates and the bar associations the other half—and not a single magistrate from the previous court was reelected. But while the 1994 court was widely seen as more professional, political party allegiances and loyalties appear to have played a factor in top judicial appointments in 1997, 2000, and 2003.⁷² The

peace accords also called for new justices of the peace to be selected throughout the country, which, after much delay, finally took place by 1994.

Although the peace accords attempted to introduce a measure of democracy into the nomination process of Supreme Court judges, and to ensure broad support across political party lines by requiring election by a two-thirds majority of deputies, the end result has been that the main political parties simply distribute among themselves the five vacancies to be elected by each legislature. Each party chooses its own candidate based on party loyalty, regardless of qualifications. The Supreme Court of Justice has become more and more partisan and is losing its independence. If in the past the court was criticized for its dependence on the wishes of the president of the republic, nowadays, increasingly, its dependency is on the political parties.

In the first ten years after the peace accords were signed, the CNJ gained prestige as it sought to improve the training and evaluation of judges. But as its reputation improved, so too has its rivalry with the Supreme Court of Justice. Disputes between the two bodies have been over which one has the right to name judges at the level of justice of the peace, over how binding the CNJ's evaluation of judges should be, and over whether the CNJ should also recommend promotions and transfers of judges.⁷³ The current CNJ law, for example, requires that it present a list of three candidates for each justice of the peace position, and currently these individuals are required to pass through a rigorous training program. However, the CNJ has discovered that the Supreme Court has been filling vacancies in alternate justice of the peace positions⁷⁴ as a way of getting its candidates into the system through the back door. According to data compiled by the CNJ, of 317 appointments made to different judicial posts over a four-year period from February 1999 to May 2003 not from lists provided by the CNJ, the vast majority, or 274, were for alternate justice of the peace posts.⁷⁵

The CNJ performs mostly administrative and procedural reviews of individual judges, including the processing of case loads in a timely fashion, and other minor issues. It does not have the ability to look into qualitative handling of cases. Even then, the CNJ's disciplinary recommendations are not binding on the Supreme Court.⁷⁶ Since 1995, the court has had a judicial investigative division to look into complaints about judges, and it is this body that is also to review the CNJ's evaluations. According to former CNJ president Lizette Kury, the Supreme Court has taken at least a year to comment upon CNJ's most recent annual evaluation of judges,⁷⁷ which meant the recommendations of the council became useless because the law gives a specific period to the court to act upon the recommendations of the council. When queried,

the court's investigative unit could only provide a statistical summary of complaints it received against different judicial functionaries, but no information is available about the results of its investigations.⁷⁸ The figures for the period since the peace accords are hardly promising. For example, during the term of the first postwar Supreme Court (1994–97), which is widely seen as one of the best courts in decades, only one judge was removed for official corruption.⁷⁹ Likewise, the court only disciplined nineteen judges in 1999, fifteen in 2000, and forty-eight in 2001—out of a total 230 that the CNJ had said should be sanctioned.⁸⁰ The court has also carried out numerous transfers, promotions, and demotions without consulting the CNJ—110 during 2002, according to the latest CNJ statistics. The situation has deteriorated even more in the last few years. According to sources in the CNJ, from 2003 to 2005 the Supreme Court only sanctioned four judges accused of corruption; one was suspended and the others were transferred to a different court.⁸¹

None of this has made for improved relations between the council and the Supreme Court. The scant attention that the court has given the evaluations of judges performed by the CNJ, as well as the court's efforts to make appointments of judges whose names were not submitted by the CNJ, underlie the lack of cooperation between two institutions that hold central places in the administration of justice. In light of the relationship between these institutions, then, it is unlikely that any sort of legitimate vetting process will be implemented in the near future.

FURTHER ISSUES

Two issues stand out as worthy of further discussion. First, the Truth Commission's recommendation that those named in its report be banned from holding public office is important, given that this issue has often been mistakenly praised, when in fact it was never implemented. Second, given that the Ad Hoc Commission's vetting of military officers represents a distinctive effort in Latin America, and a prominent case in postwar transitional situations, a discussion of the uniquely favorable circumstances that facilitated this effort is merited.

BAN ON HOLDING PUBLIC OFFICE

One of the most widely held misconceptions about the results of the UN-sponsored Truth Commission was that it barred those named in the report from holding public office for a period of not less than ten years. Indeed,

the report did make this recommendation, along with one to permanently proscribe those named from any future activity related to public security or national defense. Although the latter has been upheld in practice, and by default, the recommended ban against holding political office was immediately seen as problematic on several counts, a fact that was duly noted in a subsequent ONUSAL review of implementation of the Truth Commission's recommendations.⁸² The problems with this recommendation clearly express the difficulties of trying to punish people for committing human rights abuses during an internal conflict in which there is no victorious side. When the parties to the military confrontation (and the main actors committing human rights abuses) negotiate and define the parameters for peace, instruments such as truth commissions can become a substitute for the judicial process.

The recommendation of a ban on public office was one of those that was "inferred directly from the results of the investigation" and as such required "urgent" attention. It suggested that COPAZ prepare legislation to implement this measure. In its report, ONUSAL found that, in fact, no legislative action was possible, noting that any legislative bill "would affect essential provisions of the Constitution relating to political rights," and, moreover, was in direct conflict with other Truth Commission recommendations calling for the approval of international human rights instruments that safeguard the political rights of citizens. The legal problem with the recommendation was a serious one. The constitution explicitly establishes, in articles 74 and 75, the causes for the suspension and loss of citizen rights, and, in articles 126 and 127, the requisites and prohibitions to become a candidate for Congress; to introduce a new prohibition on the grounds of past violations of human rights would amount to reforming the constitution. In addition, the government and its majority in the National Assembly had passed a total amnesty for all violations of human rights committed during the war.

The recommendation was formally evenhanded, in that it was to be applied to both sides in the conflict. But in practice it amounted to asymmetric treatment. The negotiated peace was based on the idea that the FMLN would abandon its military practices in exchange for full participation in the political process, as a political party. However, to start this "participation" by barring from office the guerrilla leadership was clearly political nonsense, and would have put the new party at a serious disadvantage. Not only would the FMLN be entering the arena of politics for the first time, but it would have to do without its most recognized leaders as potential candidates for public office. At the same time, the armed forces, whose active members were by constitutional mandate forbidden to present themselves as candidates unless they ended

their military careers, would continue as an institution. This would have constituted a disproportionate punishment for the leadership of the FMLN, even more so considering that the great majority of human rights violations committed during the war had been committed by the armed forces.

A related problem was the limited, and discriminatory, mandate given to the Truth Commission by the peace accords. The Truth Commission was not supposed to investigate all human rights violations during the war, but only those “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.”⁸³ Practices implemented by the guerrillas during the first phase of the war, such as executing prisoners and assassinating informers (they called it *ajusticiamientos*), which were clearly human rights violations, never impacted the public enough to merit an investigation by the Truth Commission.

This explains the curious situation in which most of the criticism of the commission’s work came from conservative sectors within the country and human rights proponents abroad. The main objection of both was that the commission employed a double standard for the two sides in the conflict, being more severe with the army. It was faulted for its weak handling of cases of abuse by the FMLN, for which it tended to rely on FMLN factions’ own prior admissions, and occasionally failed to accord the same kind of command responsibility as it did with the armed forces.⁸⁴ Given that one guerrilla faction in particular had publicly claimed credit for a series of assassinations of local mayors, it would have been disproportionately punished by a ban on holding public office vis-à-vis other factions that were less forthcoming about their previous history.

AD HOC COMMISSION, VETTING, AND FORTUITOUS CIRCUMSTANCES

Although vetting and related processes of institutional reform were key to the resolution of the Salvadoran conflict, it should also be recognized that they took place under the most fortuitous of circumstances, namely:

- The Salvadoran case was one of the first efforts by the UN to help resolve an internal conflict in the post-Cold War period, before it was pulled into numerous conflicts around the world. The timing of this effort enabled greater international donor generosity.
- Domestic conditions were ripe—the implementation of the demobilization of military and guerrilla forces went forward with UN supervision, surviving any irregularities and violations.

- The U.S. government, which had played such a dominant role in support of the government and military throughout the conflict, also threw its considerable political and economic weight behind the successful negotiated end to the conflict and implementation of the peace accord provisions.⁸⁵

More specifically, there are at least nine reasons why the Ad Hoc Commission was relatively successful in carrying out a large-scale purification of the Salvadoran military.

THE ROLE OF THE UNITED NATIONS

As part of the UN-verified peace accords, compliance with the Ad Hoc Commission report recommendations did not only depend on the good will of the parties; the government would also be held accountable by the UN secretary-general, who had the power to publicly chide either side, providing a definitive statement as to who was or was not in compliance. In the case of the AHC, the UN resorted to public expressions of concern several times throughout the process.

U.S. GOVERNMENT PRESSURE

Especially in early 1993, when it became clear that President Cristiani and the armed forces were not in compliance with the *depuración*, the U.S. Congress held up some \$11 million in fiscal year 1993 military aid. While not an entirely significant sum for the military (it did not affect funds in the pipeline), this measure had a dissuasive effect on the military.⁸⁶ As noted by a March 9, 1993, cable from the U.S. embassy, the Salvadoran military may have even exaggerated the role of the United States in this matter:

The widely-held view within the ESAF [El Salvador Armed Forces] officer corps (at least the 15 holdouts) is that the USG [United States Government] has been behind their forced separation by providing names of officers and information to the Ad Hoc Commission and Truth Commission members. (This was reiterated to Chargé again March 9 by Ad Hoc Commission member Abraham Rodríguez.) They continue to view this Embassy and the USG as the principal force behind their forced resignations—a perception that President Cristiani himself may also be sharing with them—particularly in light of the recent letter from the secretary.

In fact, the United States had not shared that much information with the AHC.

Although the AHC findings eventually resulted in the dismissal of virtually the entire leadership of the Salvadoran military by mid-1993, including the *Tandona* (the influential class of 1966 from the Salvadoran military academy), it is worth noting that the U.S. government itself had come quite close to recommending this two years earlier, even before the signing of the peace accords, in response to military stonewalling in the Jesuit case. In 1991, according to the U.S. MilGroup (Military Group) Commander at the time, then U.S. Ambassador William Walker had discussed “asking State to direct him to tell Christiani (sic) that all funds should be cut off if the entire *Tandona* did not resign within 30 days.”⁸⁷ According to a cable by Walker himself, on February 19, 1991:

USG [United States Government] pleas, threats, turning on and off the military assistance spigot, and appeals to institutional honor have all had the same results—zilch...[leaving] only two choices—admit defeat and attempt to move on to other matters, or pull the plug, i.e., demand a new leadership with a clear understanding of what they, and we face. I opt for the second option.⁸⁸

IMPACT OF THE TRUTH COMMISSION

As previously noted, the AHC report was strengthened greatly by the subsequent release of the Truth Commission report, especially as it named several of the fifteen military officers who were holding out on the *depuración*.

COURAGE OF COMMISSION MEMBERS

Not to be underestimated is the courage it took the commissioners of the AHC to propose the *depuración* that they did. One of the commissioners received a death threat, while others spent several months outside of the country following the release of this report.

FMLN LEVERAGE (MISSILES, DEMOBILIZATION)

Another factor contributing ultimately to the implementation of the AHC recommendations was the timing with respect to the peace process, and the decision by the FMLN to use whatever leverage remained to force final completion of the *depuración*. As noted, some factions of the FMLN held on to their supply of surface-to-air missiles until the AHC recommendations were complete, and, among other issues, AHC delays led the FMLN to hold up demobilization of several contingents of their troops. Had the AHC report come much later, the FMLN would have had virtually no leverage in this matter.⁸⁹

At the same time, the FMLN was generally flexible on the overall timing of the *depuración*.

PRESSURE FROM BELOW

The remaining fifteen senior officers were also under pressure from junior officers, who had long been dissatisfied with their leadership. As former Ambassador William Walker noted two years earlier in a May 30, 1991, cable:

For years, junior officers have expressed dissatisfaction with the incumbent ESAF leadership and have been eager for them to retire and open up more senior positions. This sentiment is fueled by the personal ambition of junior officers, as well as the belief that the ineffectiveness and corruption of some colonels is a detriment to the institution.

This situation remained the same in 1993, by which time there was little sympathy in the ranks for the fate of the final fifteen officers.⁹⁰

PRIOR AMNESTY

The U.S. embassy argued at the time that without an amnesty, full compliance with the AHC recommendations would have been difficult:

This report—and particularly the unresolved issue of a general amnesty—may complicate President Cristiani's ongoing effort to effect the removal of the final 15 active duty ESAF officers who were cited by the AHC. These officers are unlikely to step down until the amnesty issue is settled, since there is greater legal and physical protection for them within the military.⁹¹

MONETARY INCENTIVES

Outgoing military officers were widely rumored at the time to have received significant payments as incentives for complying with the *depuración*. Declassified U.S. State Department documents tend to confirm that suspicion. For example, one report from the State Department's Bureau of Intelligence and Research (INR) refers to the "generous retirement packages and a face-saving departure calendar" that were used to persuade Minister of Defense Ponce and fourteen others to leave active service by June 30.⁹²

SECRECY OF THE PROCESS OF DEPURACIÓN

Many believe that only because the results were secret was Cristiani able to carry out the *depuración*. Dismissals and transfers could be disguised in rou-

tine orders; the U.S. embassy even suspected that secret orders were issued to implement the recommendations.⁹³ For better or worse, the military clearly preferred secrecy as a face-saving measure, and Minister Ponce even told the United States that “the consequences would be disastrous” should the names be made public.⁹⁴

These conditions were thus not only incredibly favorable for a successful peace negotiation and implementation, but some of them are also unlikely to be repeated elsewhere.

CONCLUSIONS AND FINAL CONSIDERATIONS

A review of the functions of vetting, as part of the negotiated political solution to the Salvadoran internal armed conflict, tends to support two conclusions. First, it demonstrates the usefulness of such an instrument in circumstances in which stronger responses to the underlying causes of conflict are unlikely. In the Salvadoran case, there was a broad consensus that one of these causes was the role played by the armed forces for many decades, as has often been the case elsewhere. But the fact that the guerrillas were unable to defeat the army during the twelve-year conflict made it impossible to implement the more radical solutions tried in other countries, such as: the creation of a new armed forces in Nicaragua and Cuba; the dissolution of the armed forces in Costa Rica in 1948 and in Panama after the U.S. invasion; or the integration of opposing military forces in Zimbabwe. In El Salvador, both the balance of military forces and the international context allowed only for a more “modest” solution, the vetting of the officer corps, but it was one that was instrumental in moving the peace process forward.

A second conclusion of this review is the inherent limitation of vetting processes: insofar as they deal with personnel and not entire institutions, their effects can be short-lived. The comparison between the impacts of vetting in the army and the judiciary in El Salvador illustrates the point. In the army, vetting was accompanied by a deep and comprehensive institutional reform (constitutional reform, restating the role of the institution and reduction of its size, separation of army and police, new organic legal framework), the combination of which has been one of the reasons behind the successful demilitarization of politics in El Salvador. On the contrary, in the case of the judiciary there was no direct vetting, and the institutional reform that did occur was not comprehensive and was restricted to the two leading institutions of the system, the Supreme Court of Justice and the Council of the Judiciary. The impact of these measures on democratization and the rule of law has been

weak; corruption continues to be a central problem in the judiciary and, in recent years, the composition of both the court and the council has tended to look more like the situation during the conflict than the expected democratization. In other words, the absence of comprehensive vetting and accompanying institutional reform seems to be a recipe for failure and frustrated expectations. The Truth Commission's indictment of the role of judiciary in the past, made thirteen years ago, seems as relevant today, if we drop the reference to the military:

The judiciary was weakened as it fell victim to intimidation and the foundations were laid for its corruption...its ineffectiveness steadily increased until it became, through its inaction or its appalling submissiveness, a factor which contributed to the tragedy suffered by the country. The various, frequently opportunistic, alliances which political leaders (legislators as well as members of the executive branch) forged with the military establishment and with members of the judiciary had the effect of further weakening civilian control over the military, police and security forces, all of which formed part of the military establishment.⁹⁵

A related consideration is the question of the relationship between vetting and power. As an instrument of politics, vetting depends on the institutional capacity and willingness of those in power to implement it. This is precisely the dilemma faced by the Truth Commission on the question of punishment, as the commissioners stated in their report:

The question is not whether the guilty should be punished, but whether justice can be done.... El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.⁹⁶

Our review of the different fortunes of vetting in El Salvador demonstrates this clearly. The first Revolutionary Government Junta, in October 1989, attempted the most radical response to past human rights violations: not just vetting, but criminal prosecution, although it did so while trying to exercise power in a highly critical situation and with very limited resources. To try to prosecute the top officers of the previous governments was to put in danger the careers of most of the officers still serving in the armed forces, including at least one member of the junta and the minister of defense. It is no wonder that the effort failed and became one of the reasons behind the government's downfall. The second attempt at vetting, conducted by the U.S. government in 1983, was *prima facie* successful, both because Vice President Bush

commanded enough power to bend the will of the military hierarchy, insofar as the armed forces depended on U.S. military aid to conduct the war against the guerrillas, and because it was done as a private initiative. But from the point of view of the stated objectives of the U.S. government (to curb human rights abuses by the Salvadoran military), it was a complete failure. The situation did not improve—and, it could be argued, became worse in the following years—and the institutional structures of the armed forces, as well as its political role, continued unchallenged.

Finally, the Ad Hoc Commission's *depuración*—one of the most extensive examples we know about of vetting of high officers (all the generals and more than half the colonels who conducted the war were dismissed) as part of a political settlement—was successful not only because of the favorable conditions in which it was implemented, but also because it was clearly separated from any form of judicial punishment and its procedures were kept secret.⁹⁷ But, despite these limitations, the central endeavor of the Ad Hoc Commission, namely, to avoid the country's relapse into military domination, has been achieved so far. Its effects have lasted because they were accompanied by broader institutional reform of the armed forces.

Portions of this chapter translated by Charles H. Roberts.

NOTES

- 1 This chapter uses material originally prepared by David Holiday, who drafted a first version under contract for the ICTJ. His contribution is acknowledged.
- 2 Benjamin C. Schwarz, *American Counterinsurgency Doctrine and El Salvador: The Frustrations of Reform and the Illusions of Nation Building* (Santa Monica, CA: RAND/National Defense Institute, 1991), 33.
- 3 Ibid.
- 4 For references on this commission, see Rubén Zamora, “Truth for Reconciliation. The Salvadoran Experiences of 1979 and 1992,” in *Roads to Reconciliation*, ed. Elin Skaar, Siri Gloppen, and Astri Suhrke (Lanham, MD: Lexington Books, 2005), 177–183; and William Stanley, *Protectors or Perpetrators: The Institutional Crisis of the Salvadoran Civilian Police* (Washington, DC: Washington Office on Latin America and Hemisphere Initiatives, January 1996), 148ff.
- 5 See Bob Woodward, *Las guerras secretas de la CIA* (Mexico: Grijalva, 1988), 230, 231.
- 6 Similarly, the Truth Commission was limited to analyzing those human rights violations that had grave repercussions on the life of the country.
- 7 This is the authors’ way to systematize the vetting in the peace accords, because the pertinent measures are scattered throughout the document. There is no systematic reference to vetting in it.
- 8 For instance, the members of the National Guard (rural police) and the Treasury Police were forbidden to apply to the new National Civilian Police force (but not to the armed forces). This rule did not apply to the ex-members of the National Police.
- 9 A minority of the guerrilla forces was incorporated as both commanders and rank and file into the National Civilian Police in its initial conformation as a “partnering,” convocational mechanism. United Nations, *Acuerdos de El Salvador: En el Camino de la Paz* (New York/San Salvador: UN Department of Public Information, 1992), 91.
- 10 Ibid., 55, 56.
- 11 Peace Accords, No. 8, ch. I, in United Nations, *Acuerdos de El Salvador*, 57.
- 12 Peace Accords, No. 10, ch. I, in United Nations, *Acuerdos de El Salvador*, 57, 58.
- 13 In El Salvador, prior to the peace accords, the police did not have specific officers; the commanders were armed forces officers who had no specialization in police work.
- 14 Peace Accords, No. 7(D)(c), ch. II, in United Nations, *Acuerdos de El Salvador*, 76.
- 15 Peace Accords, No. 12, ch. I, in United Nations, *Acuerdos de El Salvador*, 59, 60.
- 16 Article 187, Constitution.
- 17 Article 186, Constitution.
- 18 Mexico Accord, ch. IV, April 27, 1991, in United Nations, *The United Nations and El Salvador*, United Nations Blue Book Series, No. 4 (New York: United Nations, 1995), 167.
- 19 Ibid., 174.

- 20 Ibid., 296.
- 21 Jane Alexander, "A Scoping Study of Transitional Justice and Poverty Reduction," UK Department for International Development, January 2003, <http://www.grc-exchange.org/docs/SSAJ56.pdf>, 40.
- 22 United Nations, *The United Nations and El Salvador*, 51.
- 23 Ibid., 160.
- 24 Ibid., 195.
- 25 Ibid.
- 26 Chapter I, section 3.I. of the accords notes that the commission's evaluation could extend to noncommissioned officers, if warranted.
- 27 Salvador Samayoa, *El Salvador: La Reforma Pactada* (San Salvador: UCA Editores, 2002), 571.
- 28 United Nations, *Acuerdos de El Salvador*, 52.
- 29 Ibid., 61.
- 30 The service sheet is the official document that sets forth the record of every officer of the armed forces. It records promotions, punishments, leaves, incidents, etc.
- 31 The work of the commission, while open to the public to come forward with complaints, was completely closed in all other aspects of its procedure. The final report, containing the recommendations, is secret. There is no written document by the commission on its procedures; what is described here is based on interviews with one of its members, the secretary, and the legal counsel.
- 32 The transition period was the one in which the old National Police was still functioning, but was gradually, province by province, replaced by the new promotions of National Civilian policemen.
- 33 The peace accords, in the chapter on the *Academia Nacional de Seguridad Pública* (the training school for the new police force), stated the criteria for the new recruits. See United Nations, *Acuerdos de El Salvador*, 76.
- 34 United Nations, *The United Nations and El Salvador*, 240.
- 35 Margaret Popkin, *Peace without Justice* (University Park: Pennsylvania State University Press, 2000), 102–103. This book is key to describing judicial reform efforts in this paper.
- 36 The National Judiciary Council was created at the beginning of the 1980s as a dependency of the Supreme Court of Justice. The constitutional reforms carried out by the peace accords conferred it constitutional status as an autonomous institution, whose members were elected by a two-thirds majority of Congress, with some of them being proposed by the national university and private universities.
- 37 Popkin, *Peace without Justice*, 206–207.
- 38 The results of these evaluations are sent to the Supreme Court of Justice, which has the power to remove, transfer, or take disciplinary action on any judge, according to the constitution.

- 39 The legal problem, and the source of bitter disputes between the council and the Supreme Court, is that the constitutional reforms only refer to two functions for the council: to train and propose names to fill judge vacancies. It is in the secondary law that the function of evaluating the judges is established.
- 40 Information for this section owes a great deal to personal communication with Linda Garrett, formerly of El Rescate, February 28, 2004, as well as interviews with former commissioners and staff.
- 41 Todd Howland, "El Rescate's Contribution to the Salvadoran Peace Process: Creative Legal and Information Processing Applications," unpublished manuscript, 10.
- 42 In the negotiation of this point, the government made nonnegotiable the "reserved" nature of the AHC recommendations, making legal and political arguments. The AHC traveled to New York to write the final text of its recommendations and only two copies were produced, one for the UN secretary-general and the other for President Cristiani. The written material used by the AHC was sent to Duke University in the United States and is sealed until the president of the AHC dies.
- 43 For example, a March 15, 1993, cable from Peter Romero, who was at that time in charge of the U.S. embassy in San Salvador, noted that "there does not appear to be much support in the ranks for Gen. Ponce and the other fourteen officers cited by the AHC." All mention of declassified cables come from a 1999 declassification in the possession of the authors, available upon request.
- 44 Marrack Goulding was an expert on military matters, working at the Department of Political Affairs at UN headquarters, and functioned in the final part of the negotiations and during the transition period as the representative of the secretary-general, while Alvaro de Soto had to deal with all others issues and oversaw the overall process. During the implementation of the peace agreement both of them flew to San Salvador frequently in order to help solve various problems.
- 45 "Letter from Secretary-General to the President of the UN Security Council," UN doc. S/24805, November 13, 1992, in United Nations, *The United Nations and El Salvador*, 265.
- 46 "Letter from Secretary-General to the President of the UN Security Council," UN doc. S/25078, January 9, 1993, in United Nations, *The United Nations and El Salvador*, 286–87.
- 47 Gino Costa, *La Policía Nacional Civil de El Salvador, 1990–1997* (San Salvador: UCA Editores, 1999).
- 48 Popkin, *Peace without Justice*, 107; and personal interview, Salvador Samayoa, February 2004. Samayoa, one of the negotiators on the FMLN team, indicates that this was not just the work of one faction within the FMLN, but rather was agreed to by the principal party leaders. Whereas the People's Revolutionary Army [*Ejército Revolucionario del Pueblo*] (ERP), one of the FMLN factions, used its missiles to negotiate a better deal for the reinsertion of mid-level leadership, the Popular Liberation Forces "Farabundo Martí" [*Fuerzas Populares de Liberación "Farabundo Martí"*] (FPL), another FMLN faction, continued to hold on to its missiles until the AHC recommendations were completed.

- 49 Cable from U.S. Ambassador Alan Flanigan, March 14, 1994. This cable also notes that COPAZ—representing all political parties—actually requested of the UN secretary-general that these eight be allowed to remain. But COPAZ records show that it never made such a decision.
- 50 Personal interviews with Col. Mauricio Vargas and Col. Rolando Herrarte, February 2004.
- 51 Charles T. Call, “Democratisation, War and State-Building: Constructing the Rule of Law in El Salvador,” *Journal of Latin American Studies* 35, no. 4 (November 2003): 834–86; and J. Mark Ruhl, “Curbing Central America’s Militaries,” *Journal of Democracy* 15, no. 3 (July 2004): 137–151, here at 143.
- 52 See “Informe de la Procuraduría para la Defensa de los Derechos Humanos,” July 2001/June 2002; July 2002/June 2003; and July 2003/June 2004.
- 53 See polls by the University Public Opinion Institute [*Instituto Universitario de Opinión Pública*] (IUDOP) of the Central American University [*Universidad Centroamericana*] “José Simeón Cañas” (UCA), <http://www.uca.edu.sv/publica/iudop>.
- 54 United Nations General Assembly, Report of the Secretary-General, “The Situation in Central America,” October 18, 2000, UN doc. A/55/465, 7.
- 55 Charles Call, “El Salvador: The Mugging of a Success Story,” unpublished manuscript (July 24, 2002), 140. The only way to do a background check on an applicant is to find out if he has been convicted by a jury of a criminal offence, but that information is not reliable because under the military regime political detainees were labeled common criminals. Most of the records of members of the Treasury Police and the National Guard were destroyed by the military, as well as by the members of the official paramilitary organizations.
- 56 Stanley, *Protectors or Perpetrators*, 24–25.
- 57 William Stanley and David Holiday, “Peace Mission Strategy and Domestic Actors: UN Mediation, Verification and Institution-Building in El Salvador,” *International Peacekeeping* 4, no. 2 (Summer 1997): 22–49, here at 30.
- 58 Call, “El Salvador: The Mugging of a Success Story,” 43.
- 59 Ibid.
- 60 Personal interview with Benjamin Cuellar, director, Human Rights Institute [*Instituto de Derechos Humanos*], UCA (IDHUCA), February 2004.
- 61 Call, “Democratization, War and State-Building,” 844; and Procuraduría para la Defensa de los Derechos Humanos, “Proceso de depuración policial” y el Decreto de la nueva Ley Orgánica de la Policía Nacional Civil, Informe Especial, San Salvador, June 2002. Also, Jeannette Aguilar Villamariona et al., *Información y gestión policial en El Salvador* (El Salvador: Fundación de Estudios para la Aplicación del Derecho [FESPAD], September 2001); and Jack Spence, Mike Lanchin, and Geoff Thale, “From Elections to Earthquakes: Reform and Participation in Post-War El Salvador,” *Hemisphere Initiatives*, April 2001. The FESPAD study notes that more than fifteen hundred police were purged, but

- this number likely included police purged through normal disciplinary procedures, 1,485 persons in 2000–2001, according to Call.
- 62 Rachel Neild, “Sustaining Reform: Democratic Policing in Central America,” *Citizen Security Monitor*, October 2002, Washington Office on Latin America, 1–36, here at 5.
- 63 *El Mundo*, January 3, 2004, 5.
- 64 He was the first chief of the National Civilian Police, then became a member of the National Assembly for the ARENA party, later was appointed vice-minister of the interior for public security, and recently, in 2005, was reappointed chief of the police.
- 65 Neild, “Sustaining Reform.”
- 66 The percentages are from the IUDOP, <http://www.uca.edu.sv/publica/iudop>.
- 67 José Miguel Cruz, Alvaro Trigueros, and Francisco González, *El crimen violento en El Salvador: factores sociales y económicos asociados* (San Salvador: UCA–IUDOP, 2000), 101.
- 68 United Nations General Assembly, Report of the Secretary-General, “Assessment of the Peace Process in El Salvador,” July 1, 1997, UN doc. A/51/917, par. 23, cited in Popkin, *Peace without Justice*, 210–11.
- 69 Linn Hammergren, “Do Judicial Councils Further Judicial Reform? Lessons from Latin America,” *Carnegie Paper* No. 28 (Washington, DC: Carnegie Endowment for International Peace, June 2002), 38.
- 70 United Nations, *The United Nations and El Salvador*, 448.
- 71 From a legal point of view he was not right. According to the constitution he could be removed from office via impeachment by the National Assembly, but, in fact, nobody was prepared to do so.
- 72 Every three years, a third of the fifteen magistrates are elected for nine-year terms.
- 73 What is now considered a mistake of the constitutional reform, article 187 only gave the function of “proposing candidates” for judges to the National Judiciary Council; the function of evaluating them is in the secondary law, not in the constitution, and this is the argument used by the Supreme Court for not considering the reports of the council to be binding.
- 74 *Jueces de Paz* are the lowest level in the judiciary hierarchy. And for each post the Supreme Court appoints a *Suplente* (alternate judge) to function in case the titular judge is absent or incapacitated.
- 75 Data compiled and provided by the CNJ, in possession of the authors.
- 76 See Margaret Popkin, “Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective,” http://www.dplf.org/JIT/eng/la_jito1/la_jito1_comparative.htm. Popkin also discusses the delicate balance between evaluation and the principle of judicial independence that should be safeguarded.
- 77 Personal interview, Lizette Kury, January 2004.
- 78 Personal interview, Mateo Alvarez, director of the judicial investigative unit, Supreme Court of Justice, January 2004.

- 79 Call, "Democratisation, War and State-Building," 853.
- 80 "Country Report on Human Rights Practices: El Salvador 2001," U.S. Department of State, March 4, 2002, <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8354.htm>.
- 81 Interview with Lic. Juan José Zaldaña, formerly in charge of the evaluation unit of the CNJ.
- 82 See the report of the secretary-general containing an analysis of the recommendations of the Truth Commission, in United Nations, *The United Nations and El Salvador*, 447–48.
- 83 United Nations, *Acuerdos de El Salvador*, 17.
- 84 These points are made, to varying degrees, by Popkin, *Peace Without Justice*; Lawyers Committee for Human Rights, *Improving History: A Critical Evaluation of the United Nations Observer Mission in El Salvador* (New York: Lawyers Committee for Human Rights, 1995); and Cynthia Arnson, *El Salvador, Accountability and Human Rights: The Report of the UN Commission on the Truth for El Salvador* (New York: America's Watch, 1993).
- 85 See David Holiday and William Stanley, "Under the Best of Circumstances: ONUSAL and the Challenge of Verification and Institution Building in El Salvador," in *Peacemaking and Democratization in the Western Hemisphere*, ed. Tommie Sue Montgomery (Boulder, CO: Lynne Rienner, 2000).
- 86 On February 24, 1993, U.S. Chargé Romero met with Cristiani to deliver a letter from the U.S. secretary of state notifying him that fiscal year 1993 military assistance would be suspended until satisfactory action had been taken in the implementation of the AHC recommendations. Romero cable, February 24, 1993.
- 87 Teresa Whitfield, *Paying the Price: Ignacio Ellacuría and the Murdered Jesuits of El Salvador* (Philadelphia: Temple University Press, 1994), 394.
- 88 Ibid.
- 89 Despite the ERP's insistence that the *depuración* was part of its secret negotiations with the government, in fact, these negotiations may have prolonged the government's ability to comply.
- 90 See note 43.
- 91 March 19, 2003, cable from U.S. Chargé Romero.
- 92 U.S. Department of State, Bureau of Intelligence and Research, "El Salvador: Putting the War Behind," May 4, 1993.
- 93 February 17, 1993, Romero cable: "GOES/ESAF implementation of the AHC recommendations has been carried out with considerable secrecy, making it difficult to identify those officers who were cited by the AHC. Although Embassy has been unable to verify the existence of secret ESAF orders, evidence suggests that such orders have been used to mask the identity of those officers who have been dismissed or transferred."
- 94 October 6, 1992, Romero cable: "According to Ponce, the ESAF leadership is working closely with President Cristiani to resolve the crisis created by the AHC. However, he

emphasized that managing this delicate problem requires that the AHC recommendations be kept confidential. If the AHC's evaluation were made public, Ponce added, the consequences would be disastrous. He noted that personal interests would then come into play, which would complicate the problem. On this score, Ponce complained about the indiscretion of one AHC member, Eduardo Molina, who allegedly has been talking openly about the names of the officers on the AHC list."

95 Commission on the Truth for El Salvador, *From Madness to Hope: The 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador*, UN doc. S/25500 (1993), 172–73.

96 Ibid., 178.

97 But it can be argued that some of the conditions that made this vetting exercise possible, primarily its independence from prosecutorial efforts, also express its weakness: it was necessary to recur to the U.S. judiciary to obtain convictions of defense ex-ministers Casanova and Garcia for the human rights violations perpetrated during their tenure.

CHAPTER 3

Swift Gradualism and Variable Outcomes:
Vetting in Post-Authoritarian Greece

Dimitri A. Sotiropoulos

INTRODUCTION

For a number of years after the collapse of the Greek authoritarian regime (1967–74), a former member of the left-wing resistance, who had been imprisoned for four and a half out of the seven years of military rule, would pass by a coffee shop in the center of Athens every morning. As he headed towards his office, he would see the judge who had convicted him in a military court relaxing in the shop, quietly sipping his coffee.¹ In another instance, a former leader of the student movement against the regime found out, several years after the trial in which the policeman who had tortured him was acquitted, that the torturer had risen to the rank of chief of police of a major Greek city.² Judging from these two not uncommon examples, it seems that in post-authoritarian Greece vetting did not go far enough.

In this chapter, I first differentiate between vetting and punitive policies and briefly discuss the categories of people to which the vetting could be applied. I pinpoint some misconceptions about transitional justice and vetting in post-authoritarian Greece and then sketch the historical and political context in which the democratic transition and consolidation (1974–81) took place. The implementation of vetting has led to differential outcomes in various political and administrative institutions, which I review with an emphasis on vetting in the academic community and the judiciary. In the last section I recap my main point about the swiftness and gradualism of vetting in Greece.

VETTING AND PUNITIVE POLICIES

During a transition to democracy institutions are required to shed the principles or standards on the basis of which they used to work under authoritarian rule. The transformation of standards, so that they become compatible with democracy, goes hand in hand with the vetting of personnel. Vetting may be applied in parallel with other transitional justice measures, such as prosecutions against the staff of a deposed authoritarian regime. In my view,

however, vetting does not have a punitive rationale. Punitive policies, such as criminal prosecution, are applied in cases of violations of law, for instance torture or other violations of human rights. The rationale for vetting is linked to the legitimacy of the new democratic regime. The new regime aims to replace the prior one, which has been discredited, and the process of replacement includes the removal of the personnel which operated the repressive state apparatus.³ Vetting, which effectively means the screening of individuals, may also include the disqualification of persons who have been associated with the previous regime. The removal or disqualification of such persons means placement in inactive rosters, forced retirement, transfer to insignificant posts, annulment of promotion, or temporary suspension of duty.

The open question of course is what degree of association with abusive behavior would make someone subject to vetting. A minimum version of vetting applies only to those responsible for abuses under the deposed authoritarian regime. A maximum version could amount to the replacement of all personnel in some state institutions and the complete dismantling of other institutions. In some cases this may be necessary. Take, for instance, the *Movimiento Nacional* (National Movement) in Spain. The *Movimiento Nacional* was the political party created by Franco and used as an instrument to control Spanish administrative institutions during his authoritarian rule (1939–75); it was dismantled after the transition. Another example is the military police in Greece, which was completely revamped after the transition to democracy in 1974.

However, sometimes a much less radical transformation may take place. Except for some institutions that are considered bastions of authoritarianism, democratic transition may not mean a start *de novo* for large sections of the state apparatus. This more or less limited vetting comes as a result of the combination of, first, applying standards of responsibility and fairness that a new democracy aspires to, in order to distinguish itself ethically from authoritarianism, to acquire legitimacy, and to create a new democratic political culture; and, second, the political agenda and the constraining conditions of the transition, which often restrain any impetus to build a regime anew.

FAIRNESS, RESPONSIBILITY, AND THE CONSTRAINING CONDITIONS OF VETTING

One aspect of applying fairness and responsibility in vetting is the following dilemma: fairness may require expanding the circle of people subjected to

vetting in order to include anyone who worked for the authoritarian regime, whereas, by contrast, responsibility requires restricting the same circle so as not to jeopardize the functioning of the state and the stability of the legal environment within which social interaction takes place. An obvious issue is how large the circle of persons subject to vetting proceedings should be. Where should the vetting process stop in regard to persons who worked for the authoritarian regime? The implementation of vetting presupposes a grasp of who should be included and who should be excluded from the process. For instance today, more than thirty years after the fall of the Greek military junta—the so-called Greek Colonels—it is still difficult to get a full picture of how many people conscientiously worked for them. One may count among the junta's collaborators all persons who were appointed to top ranks of the state apparatus after the 1967 coup and until the junta's fall in 1974. Immediately after the coup, the Greek Colonels proceeded with sweeping purges and appointed a new cabinet. Gradually, they swept through the highest ranks of the judicial system, the universities, and the local governments. They appointed new mayors, replaced all prefects (who were government-appointed heads of the country's regions), and placed new general managers and boards of directors on top of the state-run companies and public bodies. They changed the leadership of the confederations of workers and civil servants, the Greek Orthodox Church (the state's official religion), and the bar associations of Athens and Salonika.

It is very difficult to find data for most of the people who collaborated with the military junta, for at least two reasons: first, between 1974 and today, archival research about the seven-year long authoritarian rule has been sparse. Although research abounds on how the Greek Colonels came to power, there are only a few sources on the regime itself.⁴ Second, there is an unspecified but probably large number of officials (officers, civil servants, etc.) who did not resist the junta and continued working in and for the state apparatus, effectively contributing to the stability of authoritarian rule, as they would have done under any kind of rule. After April 1967, thousands of Greeks continued discharging their duties in the armed forces, the police, public administration, local government, and state-run companies, obeying orders “from above,” as if a regular government turnover had taken place. It would be impossible to measure the degree to which such people actually supported the junta. Even though one should differentiate, for example, between a military general and a conscript (hierarchical differentiation), as well as between a policeman who escorts a member of the democratic resistance to the torture chamber and

a janitor of an armaments factory (sectoral differentiation), it is not easy to arrive at a consensus about where to draw the line; nor is it easy for any post-authoritarian society to bear the cost of vetting a large share of the population who worked in one way or another for a deposed authoritarian regime.

As I will argue later, the Greek answer to the problem of fairness and responsibility in vetting was to differentiate by institutional sphere. What weighed heavily in the problem of where to draw the line on vetting was the precarious conjuncture of tensions in Greece’s external relations during 1974–76 and the traditional strong role of various institutions, such as the judiciary and the police and security, in the Greek postwar political system. In other words, political considerations prompted the transitional government and the courts to reduce the circle of individuals who were vetted and/or indicted for crimes committed between 1967 and 1974.

Such considerations restricted the scope of prosecutions against military, police, and security personnel. Table 1 shows the number of different categories of officials who were prosecuted and the corresponding percentages among them who were finally tried and convicted. As there is no official comprehensive account of all these trials, my information is based on an elaboration of a list of prosecuted officials (see the source for Table 1). Except for this circle of individuals, the rest of the officials who worked for the junta in various capacities (e.g., police informants, top-ranking civil servants, the leadership of police and security forces, etc.) were not prosecuted.

TABLE 1
Number of urban police, gendarmerie, and military officials prosecuted, tried, and convicted in the “junta trials” after the 1974 transition to democracy in Greece

	POLICE	GENDARMERIE	ARMY	TOTAL
Prosecuted	58	34	99	191
Subsequently tried	56 (97%)	33 (97%)	95 (96%)	184
Eventually convicted	32 (57%)	24 (73%)	57 (60%)	113

SOURCE: My own classification of 191 individual cases of officials prosecuted for unlawful acts committed between 1967 and 1974. For the list, see Giorgis Th. Kremmydas, *Oi Anthro-poi tes Juntas Meta te Dictatoria* [Junta’s men after the fall of the junta] (Athens: Exantas, 1984), 229–85. The gendarmerie was primarily responsible for rural areas, the police for urban areas. Members of state security, who were policemen not required to wear uniforms, are counted under “police.”

The case of Greece also offers an example of the importance of the political agenda and constraining conditions for the scope of vetting in post-authoritarian periods. With the exception of the military and the university system, “dejuntification,” which was a term used as equivalent to vetting, was restrained.⁵ The Greek transitional government, which ascended to power in July 1974, was not particularly preoccupied with punitive measures against members of the deposed authoritarian regime⁶ and even less with vetting. The government’s priorities lay elsewhere. With the benefit of hindsight, I would like to argue that Konstantinos Karamanlis, who was the first post-authoritarian prime minister and led a conservative majority, single-party government during 1974–80, wanted, first, to preserve political stability in a period of tense relations with Turkey, and, second, to close all issues related to the country’s authoritarian past in order to prepare for Greece’s integration into the European Economic Community (achieved in January 1981, that is, only six and a half years after the junta fell). Political stability and the containment of popular demands were permanent concerns for all post-1945 Greek regimes. However, in 1974, Karamanlis masterminded the transition to a democratic regime, which was different from and more open than the very “disciplined” democracy that he himself had helped craft in the postwar era.

PARADOXES AND MISCONCEPTIONS ABOUT THE TRANSITION TO DEMOCRACY AND VETTING IN POST-AUTHORITARIAN GREECE

THE POLITICAL AND HISTORICAL CONTEXT

The postwar Greek crown democracy (1946–67) was shaped by the experience of the civil war between the royalist government and the communist Left (1946–49) as well as by the polarization between the right wing and the king, on the one hand, and the political forces of the center and the left, on the other. The postwar regime was a “disciplined” democracy characterized by limited freedoms and restricted political participation.⁷ Professing a nationalist and anticommunist ideology, the Greek Colonels, led by Colonel George Papadopoulos, staged a successful coup d’état on April 21, 1967. Throughout its seven-year rule, the regime was unable to institutionalize itself, as it was caught in major dilemmas and contradictions.⁸ Typical of the latter was Papadopoulos’s project to retain power in his hands, while allowing for some degree of limited political pluralism. In November 1973 the junta crushed the students’ movement in the Polytechnic School of Athens. This was a blow to the legitimacy of the junta’s project of the alleged liberalization of the

authoritarian regime. In the same month, a week after the repressed revolt, Brigadier General Dimitris Ioannides staged a coup within the coup and imposed an even stricter authoritarian rule.

The second and final blow came in the summer of 1974. Ioannides's junta staged a coup d'état in Cyprus on July 15, 1974. On July 23, Turkey, which felt provoked, reacted by invading Cyprus. The Greek military proved unable to resist the Turkish invasion and occupation of the northern part of Cyprus. The next day (July 24), the generals resorted to Karamanlis and the pre-dictatorship conservative political elite to save the situation. Karamanlis formed a transitional government of "National Unity," as it was then called.

TWO PARADOXES

After the military leaders handed over power to Karamanlis's transitional government in July 1974, they could not control the pace with which he would proceed to vet institutions nor the scope of the process. The first paradox was that the military, which had ruled unchallenged until the summer of 1974, was unable to resist the will of the incoming politicians even though they did not have control over the means of violence. A first key to solve this paradox is that there was no time to negotiate the transfer of power, as Greece was on the brink of war with Turkey. A second key is that because the military had failed in the one sphere in which it was supposed to excel, namely, mobilization for war, it was immediately discredited in the political sphere as well. For this reason, it submitted to the incoming democratic government.

A second paradox is that even though the military was completely discredited, for the reasons noted above, vetting in the military was rather slow and limited. The key to the gradualism and restraint on Karamanlis's part is that the immediate post-authoritarian period was an inauspicious time to attempt a thorough vetting: as long as tensions between Greece and Turkey remained high, vetting could weaken the Greek military as an institution and endanger the country's defense. While considerations of national defense constrained vetting in the military, considerations of political stability prevailed in vetting the rest of the state apparatus. Karamanlis aimed at building a strong executive at the expense of the other two branches, which would enable the government to work effectively. He also aimed at attaining social demobilization, which would allow the elites to rule without pressure from the masses.⁹ All these considerations were reflected in vetting.

MISCONCEPTIONS ABOUT TRANSITIONAL JUSTICE AND VETTING IN GREECE

There are some misconceptions about the democratic transition in Greece in the mid-1970s. One scholar states that within six months after the regime change of July 24, 1974, some 108,000 officials and civil servants were “dismissed, transferred or otherwise disciplined.”¹⁰ Another observer claims that “there was also a drastic purge of officers and officials in the public service. The purge went deep into local government and the judiciary as well as the Ministries.”¹¹ According to another source, “about 100,000 civil servants were purged.”¹²

None of the sources mentions any relevant field research or interviews or research on statistical data of civil service personnel. They probably also offer inflated numbers, which may be attributed to the lack of concrete empirical research on this topic in the first years after the fall of the junta. The numbers mentioned above cannot be true for the following reasons: the total number of civil service personnel at the time was not that large. In May 1968 there were only 96,922 public employees in Greece. Of these, about 50,000 were civil servants and the rest were other public employees, such as police officers, nurses, and teachers.¹³ Five years after the fall of the dictatorship, in December 1979, there were 65,237 civil servants.¹⁴ Hence, in the decade of the 1970s, the number of public employees should have been somewhere between 65,000 and 96,000. Although there are no precise figures for the second half of 1974, when the transition to democracy occurred, the total number of public employees in all categories should have been less than 100,000. Obviously, then, we cannot speak of 100,000 purged civil servants, as do two of the above-mentioned sources. A second misconception concerns the number of trials of torturers. One source stated that a “few hundred trials took place.”¹⁵ Another claims that over the next two years, 1975 and 1976, “between one hundred and four hundred torture trials were conducted in Greece.”¹⁶ Neither of the above claims stands to scrutiny. The few available Greek sources on the topic give the smaller numbers shown in Table 1, above.

VETTING OF THE GOVERNMENT, JUSTICE, AND UNIVERSITY SYSTEMS

After the fall of the junta, the Court of Cassation decided that the crime of high treason was started and completed on April 21, 1967; that is, it was not committed continuously. (The events of April 21, 1967, did not constitute a

“revolution,” as the Greek Colonels had labeled their actions, but a “momentary” coup.) As a consequence, the political officials who had collaborated with the junta were not guilty, as they held ministerial posts during 1967–74, after the crime was already completed.¹⁷

Initially, the Karamanlis government did not draft new legislation either to prosecute or to vet the principals of the junta and their subordinates. Between July and October 1974, the transitional government, fearful of provoking the army at a time of crisis in the country’s external relations, did not take action against any of the junta’s leaders or those associated with the junta. The rationale was that an elected government, rather than a temporary government in charge of democratic transition, should decide on these issues. Karamanlis pursued punitive policies and, less so, vetting only after he won the first post-authoritarian elections with 54% of the vote in November 1974.

For this reason, before the elections the transitional government limited itself to removing some generals, isolating other officers, and monitoring the moves of the junta’s leaders. In August 1974, in order to vet army officers, the government resorted to the Supreme National Defense Council, a government organ that had existed for a long time and had the jurisdiction to promote or retire officers. Eleven generals were forced to retire. In September, this council put an unverified number of middle- and lower-ranking officers on temporary suspension.¹⁸ It seems that the criteria used in this process were whether the officers occupied top-ranking posts on the eve of the fall of the junta (in the case of generals) or had taken active part in the coups of April 1967 or November 1973 (in the case of the rest of the officers). In August–September 1974 the government reassigned three police and security officers to insignificant posts and relieved another seventeen of their duties for a period of four to twelve months.¹⁹ The reassigned or relieved officers were notorious for having tortured members of the democratic resistance. Such measures were not the result of a systematic vetting of the security apparatus, only the consequence of the pressure of public opinion felt by the government.

Indeed, while the government showed restraint in dealing with the army generals and police and security officers, measures against the junta’s leaders were precipitated by developments beyond its control: the suit of a private citizen against the junta leaders on September 6, 1974, started the process of trials involving top-ranking military officers.²⁰ The legal base for the suit was a criminal act, high treason, included in the Greek Criminal Code of 1950.²¹ The government was prompted to act. It chose punitive practices rather than vetting. The legislation of the anticommunist postwar Greek state provided for the deportation of political dissidents to isolated places, usually small

islands in the Aegean.²² In October 1974, Karamanlis used such old legislation to deport the five most prominent junta leaders to one such island.²³

In the meantime, about one thousand lawsuits were filed by private citizens in the fall and winter of 1974. Unsure of the evolution of the transition to democracy, some victims of the junta did not show up to either prosecute or testify.²⁴ As shown in Table 1 above, some 191 military, security, and police officials were prosecuted. At the time, there was no law for the specific crime of torture. The charges, which in some cases were multiple, were homicide in the first degree, attempted homicide, abuse of power, bodily harm (light or heavy), and moral responsibility for the above.²⁵ When the trials ended, approximately two years later, 57% of the prosecuted police officers, 73% of the gendarmerie, and 60% of the military were convicted (Table 1).

VETTING OF OFFICIALS IN THE CENTRAL AND LOCAL GOVERNMENT AND THE WIDER PUBLIC SECTOR

Three months into the transition, the government introduced two pieces of legislation. The first was the Constitutional Act of October 3, 1974, which assigned the responsibility for investigating the case of “those primarily responsible” for the authoritarian rule (meaning the junta’s leaders) to a higher court, the Athens Court of Appeals. A second relevant piece of legislation was one of the first Parliamentary Resolutions of the first post-authoritarian Parliament, which was elected on November 17, 1974 (Resolution D of January 15, 1975). The act and the resolution limited their focus to the act of conspiracy on the part of military officers who led the coup of April 21, 1967; and the arrest and detention of about sixty-five hundred civilians on the day of the coup, including the then prime minister Kanellopoulos and former ministers.

With the exception of the perpetrators of the 1967 coup, none of the persons who had served in the last or previous cabinets between 1967 and 1974 was brought to trial. Twenty-four protagonists were tried for high treason by the Athens Court of Appeals in 1975 and received long sentences. The three leaders of the 1967 coup (Georgios Papadopoulos, Nikolaos Makarezos, and Stylianos Pattakos) received death sentences, which were commuted to life imprisonment by Karamanlis himself. Nine other persons (among the twenty-four indicted) received life imprisonment. Most of the convicted stayed in prison for a long time before being released on the grounds of irreparable health damage.

All general secretaries of ministries and all prefects (*nomarches*) and province governors (*eparchoi*) were also replaced in the first weeks after the

transfer of power.²⁶ All presidents and general directors of public bodies, state-run companies, and state-owned banks were replaced by new personnel loyal to the emerging democratic regime. All mayors and members of town councils who had been appointed by the junta were fired. Owing to the lack of historical research and the difficulty of accessing archives, it is difficult to confirm the exact number of people who were “purged.” In regard to regional and local government, among those “purged” one may include the 199 prefects and province governors and mayors of the 6,061 municipalities that existed in Greece in 1974 (according to the Population Census of 1971).²⁷ The records of these officials were not checked individually. All were replaced outright simply by virtue of the fact of having worked for the previous regime. The transitional government appointed new officials to all the above posts, with the exception of local government, where it reinstated the mayors and town councils that had been elected in 1964, the last time municipal elections had been held before the breakdown of the democracy.

VETTING OF HIGHER JUDGES: ISSUES OF LEGITIMACY, PROCESS, AND CRITERIA FOR THE SELECTION OF IMPLICATED INDIVIDUALS²⁸

The association of prominent members of the judiciary with the Greek Colonels’ regime was not negligible. It suffices to say that the first, short-lived government imposed by the junta in the spring of 1967 was headed by a high-ranking judge and that the judiciary was a professional category that was disproportionately represented in the junta’s cabinets: 9% of all ministers during 1967–74 were former judges or public prosecutors.²⁹ Thus, in the summer of 1974 it seemed pertinent to vet the judiciary.

The legislation for vetting the judiciary was first issued on August 7, 1974, that is, almost immediately after the collapse of the junta on July 23, 1974. This piece of legislation, which was a constitutional act, provided for the functioning of a body, the Highest Disciplinary Council.³⁰ This was a council already provided for by the pre-dictatorial Constitution of 1952 (article 111). The transitional government did not specify the organization and functioning of this council until late September 1974.

On September 5, 1974, the transitional government issued another constitutional act. Its purpose was to restore legality to the justice system and to reconstitute those judges who had been dismissed during 1967–74. This act called back into service those judges who had been purged by the junta. During the Greek Colonels’ regime, a total of approximately forty judges had been forced to resign or had resigned in protest for the intrusions of the junta in the

administration of justice. At the same time, other judges had been promoted to the posts made available by the junta's purges.³¹ After the 1974 transition, the rank and postings of restituted judges would be determined individually by the appropriate councils of the justice system (the service councils, which were in charge of promotions and retirements). In parallel, the act referred those judges who had been promoted by the junta to the Highest Disciplinary Council. However, the act provided only for the cases of promotions to the posts of president and vice president of the country's three highest courts, namely the Court of Cassation, the Council of the State (the highest administrative court, somewhat similar to the French *Conseil d'Etat*), and the Audit Office (Elegktiko Synedrio, the equivalent of the French *Cour des Comptes*, which in Greece had the jurisdiction of controlling the state's finances but also acted as a court and passed judgments in cases of financial disputes among public bodies, matters of state pensions, etc.) and to the post of the general prosecutor. In other words, the cutoff point was placed very high, exempting from vetting the vast majority of middle- and high-ranking judges and prosecutors who were promoted in the hierarchy of the justice system during 1967–74, but never reached the very top. In a development parallel to that in the vetting of universities, those judges who had benefited from the purges of their colleagues by the junta, as they moved on in their careers and occupied the posts of their purged colleagues, were not touched by restituting legislation.³²

The act provided for the criteria to be applied and the penalties to be imposed by the Highest Disciplinary Council in vetting the former occupants of the highest echelons of the justice system during 1967–74. The criteria were of three kinds: first, the conditions of promotion to the post of president, vice president, or general prosecutor; second, the professional conduct of the person vetted; and, third, his conduct outside the confines of the justice system, which implied his involvement with the junta. The criteria to evaluate such conduct were not determined in either a stable or a systematic fashion.³³ Examples of projunta conduct included official declarations in support of the junta or collaboration with the junta in order to monitor and/or sanction members of the resistance against the junta. The penalties to be imposed were forced retirement, annulment of promotion, or temporary suspension of duty.

The act exempted from this referral those judges who had collaborated with the junta but were already retired at the time of the collapse of the authoritarian regime.³⁴ The act also gave the minister of justice a deadline of three months to sue any other judges who had committed any other disciplinary

fault during 1967–74 or had served at a political post (minister, deputy minister, general secretary of ministry) in the same period. The act did not cover the cases of judges who had contributed to the formulation of the junta's policies by participating in committees to prepare drafts of law or drafts of the two authoritarian constitutions of 1968 and 1973. This is another instance in which the transitional government chose not to widen the circle of implicated persons. Vetting in the judiciary was to be restrained and gradual.

Another piece of legislation, the constitutional act of September 24, 1974, brought about a modification in the above procedure. The restitution of judges who had been purged by the junta was taken out of the hands of the usual competent organ, namely the service councils of the judiciary, and passed to the cabinet. This was a move towards an outright politicization of the restitution process, which opened possibilities for discriminating for or against judges who had been purged by the junta.

The rest of the organizational aspects of the Highest Disciplinary Council were determined by a legislative decree issued on September 30, 1974.³⁵ The decree provided that the council would consist of seven members. Its head would be the president of the Council of the State. The other six members would be drawn by lot as follows: two law school professors, two high judges from the Council of the State, two high judges from the Court of Cassation, and two high judges from the Audit Office. However, two of the six judges would be exempted if the person to be vetted served in their court. So, for example, if the case of a judge of the Court of Cassation were to be discussed by the council, only the judges from the other two courts, the Council of the State and the Audit Office, plus the two professors would participate in the council.³⁶

Two provisions of the legislative decree of September 30, 1974, are noteworthy in the context of my claim about the gradualism and swiftness of the vetting process. First, the pool of high judges in the three courts out of which the members of the council were to be drawn by lot included judges who, without openly collaborating with the junta, had benefited from the dismissals of many of their colleagues by the junta. Such judges had climbed up the ladder of hierarchy quite quickly due to the openings created by the junta's purges. Second, the Highest Disciplinary Council was to decide on all cases in the first and last instance; there was no right to appeal.

The results of implementing all the aforementioned provisions for vetting were meager. Shortly after the demise of the junta, the leading judges of all three high courts were replaced:³⁷ the president and two vice presidents of the Council of the State, the president of the Court of Cassation and the general

prosecutor, as well as the president and two vice presidents of the Audit Office. The replacement of the top judges was decided by the prime minister and the competent ministers. The criterion for replacing them was the sheer fact that they had been hand picked by the junta and, consequently, they could not be trusted in the transition process. Only twenty-three judges were charged with disciplinary offenses by the Highest Disciplinary Council. Five of them were absolved. The vetting process for another six was cancelled for various procedural reasons (death of the person subjected to vetting, delay in the filing of the case beyond the deadline set by the government). The remaining twelve received sanctions (eight received annulment of their promotion, three were forced to retire, and one received temporary suspension).

To conclude, only those judges who had been appointed to the highest posts in the judicial hierarchy before the collapse of the junta and were still in place after July 1974 were to be vetted. The rest, namely middle- and lower-ranking judges, were not included in the circle of persons to be vetted. There was no pressure from the post-authoritarian governments of Karamanlis to vet *pro-junta* members of the judiciary. The reluctance of the Karamanlis government to pursue vetting in the judiciary is related to the traditional role of judges in the Greek postwar political system. In the 1950s and the 1960s, as was the case with the police and security forces, the judiciary had played a prominent role in building an anticommunist semidemocratic regime, instead of a fully fledged parliamentary democracy, in the period between the end of the Second World War and the breakdown of democracy (1944–67).

To sum up, the only vetting of the judiciary that took place were the twenty-three cases dealt with by the Highest Disciplinary Council. Overall, the only removals from the judiciary were the twelve judges sanctioned by that body, including the presidents and vice presidents of the top courts who were “purged” by the prime minister immediately after the transition.

VETTING OF ACADEMICS: ISSUES OF LEGITIMACY, PROCESS, AND CRITERIA FOR THE SELECTION OF IMPLICATED INDIVIDUALS

In the university system, the transitional government had two concerns: first, to reconstitute the jobs to those academics who had been dismissed by the junta for political reasons; and, second, to evaluate the cases of the academics who had obtained their teaching posts during 1967–74 as well as to sanction the academics who had openly collaborated with the junta. In the postwar period (and until 1982) the hierarchy of Greek academics included full professors, each of whom held a “chair,” and associate professors (*yfghites*, the equivalent

of the German *Dozenten*), who were the higher-level academic personnel; and lower-level academic personnel who were either PhD holders with teaching duties (*epimelites*) or teaching assistants (*voithoi*). This differentiation as well as the two concerns noted above were reflected in the constitutional act of September 3, 1974, which was drafted to deal specifically with the vetting of universities.

First, the act provided for the automatic rehiring of professors who had been dismissed or forced to resign for political reasons by the junta; and, second, it set criteria for vetting the academic community, differentiating between two categories of academics that had been favored by the junta. The first category consisted of those who had been appointed by the junta to any post in the government, the public administration, or the wider public sector for any length of time between April 21, 1967, and July 23, 1974 (i.e., the beginning and the end of the authoritarian regime). To deal with this first category, the act provided for the establishment of a new body, the Special Disciplinary Council, in charge of judging the cases of higher-level professors who had been appointed to the aforementioned posts and also the cases of other professors who, without pursuing a political career, had actively sided with the junta inside the university system (e.g., had collaborated with the security forces to suppress the student movement).

The second category of implicated individuals consisted of those academics who had been elected by the individual departments and schools to the old chairs previously occupied by academics purged for political reasons between April 1967 and July 1974.³⁸ The act did not provide for the cases of full or associate professors who had been elected to new chairs, first created by the junta, during 1967–74, or for the cases of those professors who occupied chairs made available in the same period for reasons other than the dismissal of their holders (death, retirement, etc.). The procedure provided by the act was the following: the restitution of the professors purged by the junta would take place before the reevaluation of those appointed by the junta. After the restitution of the former, the most senior professors were assigned to reevaluate those appointed by the junta. The criteria for such evaluation referred to behavior in support of the junta, such as denouncing left-wing students to the authorities, or participating in administrative organs staffed by the junta, for example, the administrative organs of the universities.

The act was less lenient with regard to lower-level academic personnel. Any academics below the level of associate professor who had been hired after April 21, 1967, were subject to reevaluation, regardless of the reason or the conditions of their hiring. All lower-level academic had to obtain a major-

ity of two-thirds of the votes of professors in their department in order to keep their posts. In other words, potentially, the circle of implicated lower-level academics was wider than the circle of implicated full or associate professors, even though the latter had more power and authority during 1967–74 and, as will be noted below, had collaborated with the junta in large numbers. Although there is no precise information, it seems that in practice few, if any, lower-ranking academics were vetted.

A few more pieces of legislation specified the criteria and the procedure by which the junta's collaborators among the academics would be vetted but also narrowed down the circle of higher-level academics to be reevaluated. The first piece of legislation was a presidential decree by which the nine members of the Special Disciplinary Council were selected and appointed.³⁹ The second was a legislative decree⁴⁰ that narrowed even further the circle of higher-level academics to undergo vetting. Reversing the aforementioned constitutional act of September 3, 1974, this decree also proceeded to exempt from vetting those full or associate professors who were elected to old chairs, made available during 1967–74 only because their previous holders had been purged by the junta. The result was that academics were to be vetted only in cases in which they were proven to have been active supporters of the junta. The way in which they had obtained their academic posts was not a criterion for vetting.

All the above pieces of legislation were passed by the transitional government before the first post-authoritarian parliamentary elections of November 1974. After the elections, which were won by Karamanlis's conservative party, a resolution (passed by the new Parliament in January 1975) extended by ten months the time period given to the Special Disciplinary Council to complete its task.⁴¹ The nine members of the council were selected by the transitional government. The chairperson was the president of the Council of the State. The other eight members were four judges from the Council of the State and four full professors. The Special Disciplinary Council was organized along the lines of a typical court and followed the usual procedures (hearings took place, the implicated academics were called to defend their case in front of the council, etc.).⁴² However, there was no provision for a court or a council of second instance. The council's decisions would be final. This provision reflected the transitional government's determination to proceed with vetting in a swift manner.

Several points are worth noting. First, the care taken by the government to vet the academic community reflected the symbolic importance of the university system as an institution that should cultivate ideas of freedom and human

dignity and independence of thought in a democratic society. Second, the extent and detailed nature of the relevant legislation as well as the speed with which vetting began (the relevant act was passed in early September 1974, just a few weeks after the fall of the junta) reflected the legitimacy and the power of the student movement, which had been the only collective actor to engage in massive resistance against the junta. The involvement of the students in the process of vetting was probably the only case of participation “from below” in the vetting which took place in Greece during 1974–75. The legitimacy of the extraordinary and short-lived body called the Special Disciplinary Council derived exactly from the wide consensus in favor of “dejunification” among the student body. Finally, there was a contrast between tertiary (i.e., higher education) and the other, lower levels of education. The cases of *projunta* teachers and officials of the Ministry of Education (such as school inspectors) were not touched at all.⁴³ The differentiation between higher education and the other levels of the educational system, and the narrowing down of the circle of professors to undergo vetting point up the aspect of gradualism in the Greek case of vetting. The swiftness of the vetting process is shown in the speed with which the relevant legislation was passed and with which the special body in charge of vetting was constituted.

The Special Disciplinary Council examined ninety-two cases of academics. Only seventy-eight of them suffered some disciplinary measure, such as temporary suspension. Thirty-nine out of the seventy-eight professors were fired.⁴⁴ At the time, Greek universities were dominated by large-scale student movements that, for more than a year, had pressed for the suspension or firing of large numbers of professors whom the students suspected as junta collaborators. Despite such pressure, an unverified number of collaborators did not suffer any consequences. There are several reasons for this. Some collaborators among the academics had quickly changed sides and had approached the democratic factions within the universities. Others claimed that their low rank obliged them to follow the orders of higher-ranking academics who had collaborated with the authoritarian regime. In other cases it proved impossible to show that particular professors had denounced members of the resistance to the police.⁴⁵ Even when and where vetting did not result in the expulsion of *projunta* academics from the universities, the general climate in these institutions was hostile to any professors who had not resisted the junta. Some academics who had collaborated with the authoritarian regime, but were not disciplined by the Special Disciplinary Council, would carry a stigma for a long time after the transition to democracy. Compared to vetting in the police and the judiciary, vetting in the university system was extensive.

VETTING OF THE MILITARY, POLICE, AND SECURITY FORCES

THE MILITARY

In the military, vetting, which resulted in temporary suspension of duty, reassignment to insignificant posts, or forced retirement,⁴⁶ was gradual. In the beginning of the transition, the military officers who were junta leaders or its most brutal collaborators remained free. Major Anastasios Spanos, the chief of the most notorious military police torture center in Athens, was not arrested. In August 1974, he was transferred to a post at the northern Greek border. Papadopoulos, the leader of the 1967 coup, was free until the end of September 1974, when he was placed under house arrest. Ioannides was free until he was finally arrested in mid-January 1975.⁴⁷

Generally, the process of vetting the military would have proceeded in this gradual and stepwise fashion, were it not for the abortive coup d'état staged by middle- and low-ranking officers in February 1975. The coup, which was instigated by officers loyal to Ioannides, was quickly stifled by Minister of Defense Averoff and by military generals loyal to Karamanlis. The latter then recognized the pitfalls of proceeding too cautiously with "purging" the army. It is reported that in the aftermath of the coup, five hundred military officers were forced into early retirement and another six to eight hundred were transferred to various posts.⁴⁸ Among the cashiered officers were fourteen generals and twelve brigadiers.⁴⁹

Between the spring and the winter of that year, the military officers who had been prosecuted for their role in the coup of 1967 or in the suppression of the revolt at the Polytechnic School or in torturing members of the resistance were indicted and tried (for data on the number of persons indicted, see Table 1). Some, like Ioannides, received multiple sentences, as they were tried on several counts. Military officers who had been notorious torturers (such as Spanos, Theodoros Theofylogiannakos, and Nikolaos Hadjizissis) received prison sentences ranging between seventeen and twenty-three years. Lesser known torturers, such as six naval officers who had engaged in torture aboard a cruiser in 1968, were also tried in 1975 and received sentences ranging from six months to eight years.⁵⁰ Today, neither the details of the vetting process nor the exact number of officers who were subjected to vetting are part of public information. One source claims that in the mid-1970s the Greek army had approximately fifteen thousand officers; that the numbers of people subjected to vetting in the military ranged between five hundred and fifteen hundred officers; and that in 1974–75 "purification touched a relatively small percentage of officers."⁵¹

THE POLICE AND SECURITY FORCES

Vetting in police and security forces resulted in the replacement, reassignment to positions of minor importance, or pensioning off of officials who occupied high-ranking posts under the junta or had become notorious for violating human rights. The decisions about which individuals to replace or remove were taken by the prime minister and the competent ministers of the transition government.

In midsummer 1974, the transitional government replaced the chiefs of the urban police and gendarmerie, the Greek intelligence service, and the National Security Service (a branch of the police focusing on monitoring the Left, including student and labor movements). These officials were quickly discharged of their duties because they had identified with the deposed authoritarian regime and could not be trusted in a period of democratic transition. As for the rest of police and security personnel, Psomiades is correct to point out that “only a handful... namely some but not all who had acquired notorious reputations for brutal conduct under the dictatorship were placed on inactive rosters.”⁵² In the aftermath of the attempted coup of February 1975, vetting was accompanied by starting prosecutions against officers of the urban police (*astynomia*) and the gendarmerie (*chorofylake*). An unspecified number of police officers were forced to retire, while twenty-five officers of the gendarmerie and nineteen of the police were prosecuted.

Prosecutions were not as limited as vetting. Private citizens took the initiative to press charges against top police officers, who had overseen round-ups of students and other members of the resistance, and against torturers, who were middle- or low-ranking policemen. Trials took place in Athens, Salonika, Chania, Chalkida, and other smaller towns in 1975. The fact that trials were dispersed and that there is no primary or secondary source available containing systematic information on all the defendants makes access to the data very difficult. However, as shown in Table 1 above, the approximate number of prosecuted police officers was fifty-eight and the corresponding number of gendarmerie officers was thirty-four. The trials were held before ordinary (i.e., not military) courts of first instance. Although the crimes were acts of torture, again the prosecution was couched in terms of light and heavy bodily damage, as in the case of military torturers. The number of indicted policemen was “highly circumscribed.”⁵³ In addition, most sentences were suspended or converted to monetary fines. The notorious torturer Evangelos Mallios was brought to trial in November 1975 and received a ten-month sentence, convertible into a fine. He was assassinated a year later by the left-wing terrorist organization “17th of November.” Another notorious torturer, Petros

Babales, who also had received a light sentence in the same trial, was assassinated four years later, in 1979.

Prosecutions and removals of junta collaborators in the police picked up after February 1975 (i.e., eight months into the transition), but did not go very far. The limited extent of such punitive policies may be accounted for by the traditional role of the police in the Greek state apparatus. Even before the 1967 coup, police and security forces played a primary role in monitoring political forces of the Center and the Left. According to a private citizen, who in 1974 pressed charges against police officers who had tortured him, it was the judiciary (itself not adequately vetted) that shielded the police from harsh sanctions.⁵⁴

In sum, while it was more extensive in the military, whatever little vetting took place in the police and security forces after the transition to democracy concerned only the highest-ranking officers. By contrast, punitive policies other than vetting, such as removals and prosecutions, were applied to lower-ranking officers as well. All in all, ninety-two police and security officers were “purged” through removals and prosecutions.

CONCLUSION

My major conclusion is that vetting in various institutions in post-junta Greece was swift and gradual. This conclusion is a general pattern of the Greek case but is not equally valid for all institutions; nor was vetting equally extensive in all institutions (see Table 2).

TABLE 2
The extent of vetting in various institutions of post-authoritarian Greece

	APPROXIMATE NUMBER OF PERSONS VETTED
Universities	92 professors and associate professors
Justice system	23 high-ranking judges
Military	1,300–1,500 officers
Police and gendarmerie	92 officers
Total	1,500–1,700 persons

SOURCES: Pikramenos, *He Dikastike Anexartisia*, 306, 333–35; Alivizatos and Diamandourous, “Politics and the Judiciary,” 47; Psomiades, “Greece,” 263; Danopoulos, *Warriors and Politicians*, 135. The table does not include the number of individuals who held political posts in July 1974, such as cabinet ministers, who were immediately replaced, rather than vetted, by the incoming transition government.

A difference between vetting the university and justice systems, on the one hand, and the military, police, and security institutions, on the other, was that the transitional government passed specific legislation to facilitate the vetting of *projunta* academics and judges. The reasons for this special care taken by the government to vet the justice and university systems are not the same for both institutions. In regard to the justice system, the obvious concern was to complement the democratic transformation of the executive and the legislative “branches of government” with the corresponding transformation of the judicial branch. An antidemocratic judiciary, loyal to the authoritarian regime, could have delayed or even halted the process of democratization as a whole. In regard to the university system, the primary reason for passing specific legislation to vet academics lay in the pressure exerted by the students on the transitional government and in the evident importance of academia as a source of freedom and critical thought. An antidemocratic academia would be a contradiction in terms.

The entire process was also fragmentary in Greece. There was neither a general procedure suitable to vet all political and administrative institutions nor any central institution entrusted with the process of vetting. There was no uniform process to cover the armed forces, the police and security forces, and the ministries and public agencies. As in most instances of legitimate vetting, the criteria used for vetting in post-authoritarian Greece were related to specific instances of behavior of the vetted individuals. For example, in the scarce vetting of the military that took place in the summer and fall of 1974, active participation in the coup d'état of April 21, 1967, or in the coup of November 1973, or in the coup against Archbishop Makarios in July 1974 in Cyprus was taken into account. Later, in 1975, such criteria were somewhat relaxed. Known association with prominent members of the junta or with informal circles of the junta's supporters probably mattered somewhat in the case of vetting the military after the aborted coup d'état of February 1975 (participation in that coup obviously mattered, too). In the case of vetting the body of university professors and the higher-ranking judiciary, active support of the plans of the junta in the educational and judicial systems mattered a lot. In the case of middle- and low-ranking judiciary, such association with or open support of the junta did not seem to matter, as vetting was very circumscribed or did not take place at all.

Indeed, vetting in post-authoritarian Greece had variable effects, depending on the institution in question. Vetting was effected to a larger extent in the military and the universities, but for completely different reasons. In the first case, it was the aborted coup of February 1975 that precipitated vetting

that until then had been gradual and restrained. In the universities, by contrast, pressure for “dejuntification” of academic personnel mounted early on in the transition. In other institutions, such as the judiciary and the police, vetting was measured (to put it mildly). In the central and local government and the wider public sector vetting was limited to the uppermost echelons of the hierarchy. Finally, it is doubtful whether vetting touched the ranks of the civil service at all. It was only with the mobilization of socialist and communist trade unions towards the end of the 1970s and the advent of the socialist party in power in 1981 that important state sectors, such as the security apparatus and the central public administration, were eventually cleansed of most *projunta* elements.

APPENDIX: LIST OF PERSONAL INTERVIEWS CONDUCTED IN THE CONTEXT OF THIS CASE STUDY

- 1 Interview with lawyer and former member of the resistance, Salonika, December 30, 2003.
- 2 Interview with law school professor, University of Salonika, January 5, 2004.
- 3 Interview with former member of the resistance, Salonika, January 5, 2004.
- 4 Interview with former member of the resistance, Athens, January 28, 2004.
- 5 Interview with law school professor, University of Athens, February 11, 2004.
- 6 Interview with lawyer and former member of the resistance, Salonika, March 6, 2004.
- 7 Interview with medical doctor, who was former member of the resistance, Athens, March 10, 2004.
- 8 Interview with the general secretary of the Ministry of Interior, Athens, May 4, 2004.
- 9 Interview with journalist who was former member of the resistance, Athens, May 30, 2004.
- 10 Interview with former member of the resistance, Athens, June 16, 2004.
- 11 Interview with judge of the Council of the State, Athens, July 5, 2004.
- 12 Interview with professor of classics who was former member of the resistance, Athens, July 6, 2004.
- 13 Interview with medical doctor who was former member of the resistance, Athens, July 6, 2004.

The interviews took place in the offices or houses of the interviewees. The interviews were open ended and revolved around the cases of the junta's collaborators against whom the interviewees pressed charges in 1974–75 and around the extent, the procedures, and the different outcomes of vetting in the various institutions with which the interviewees were familiar.

NOTES

- 1 Interview, Athens, January 28, 2004.
- 2 Interview, Salonika, January 5, 2004.
- 3 Eric Brahm, "Lustration," Intractable Conflict Knowledge Base Project, Conflict Resolution Consortium, University of Colorado, 2003, <http://www.beyondintractability.org/m/lustration.jsp>.
- 4 For example, P. Nikiforos Diamandouros, "Regime Change and the Prospects for Democracy in Greece, 1974–1983," in *Transitions from Authoritarian Rule: Southern Europe*, ed. Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (Baltimore: The Johns Hopkins University Press, 1986), 138–64; Chris M. Woodhouse, *The Rise and*

- Fall of the Greek Colonels* (New York: Franklin Watts, 1985); Yanna Athanassatou, Alkes Righos, and Serapheim Seferiades, eds., *He Dictatoria, 1967–1974* [The dictatorship, 1967–1974] (Athens: Kastaniotes, 1999); Meletes E. Meletopoulos, *He Dictatoria ton Syntagmatarchon* [The colonels' dictatorship] (Athens: Papazeses, 1996).
- 5 Nicos C. Alivizatos, *Les Institutions politiques de la Grèce à travers les crises, 1922–1974* (Paris: Pichon et Durand-Auzias, 1979), 547; Neovi M. Karakatsanis, *The Politics of Elite Transformation: The Consolidation of Greek Democracy in Theoretical Perspective* (Westport, CT: Praeger, 2001), 153; Yannis Voulgaris, *He Hellada tes Metapolitefses, 1974–1990* [Post-authoritarian Greece, 1974–1990] (Athens: Themelio, 2001), 35–36.
 - 6 Nicos C. Alivizatos and P. Nikiforos Diamandouros, “Politics and the Judiciary in the Greek Transition to Democracy,” in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame, IN: University of Notre Dame Press, 1997), 37–39.
 - 7 Diamandouros, “Regime Change”; Nicos P. Mouzelis, *Modern Greece: Facets of Underdevelopment* (London: Macmillan, 1978); Constantine P. Danopoulos, “Democratizing the Military: Lessons from Mediterranean Europe,” *West European Politics* 14, no. 4 (1991): 25–41.
 - 8 Diamandouros, “Regime Change,” 146, 154–55.
 - 9 Takis S. Pappas, *Making Party Democracy in Greece* (London: Macmillan, 1999), 40–41, 44–45; Thanos Veremis, *The Military in Greek Politics: From Independence to Democracy* (London: Hurst and Co., 1999).
 - 10 Harry J. Psomiades, “Greece: From the Colonels’ Rule to Democracy,” in *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism*, ed. John H. Herz (Westport, CT: Greenwood Press, 1982), 255.
 - 11 Woodhouse, *Rise and Fall*, 170.
 - 12 Alexandra Barahona de Brito, Carmen González-Enríquez, and Paloma Aguilar, “Introduction,” in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González-Enríquez, and Paloma Aguilar (Oxford: Oxford University Press, 2001), 3.
 - 13 Dimitrios Argyriades, *Some Aspects of Administrative Change in Four Mediterranean Countries: Portugal, Spain, Turkey, Greece* (Paris: Organisation for Economic Co-operation and Development, 1970), Table I.
 - 14 Ministry of the Presidency, *Deltio Statistikon Stoicheion Prosopikou Demosion Yperesion tou Etous 1980* [Statistical newsletter on the personnel of public services for the year 1980] (Athens: Ministry of the Presidency, 1981), 13; the source offers no data for the rest of public employees.
 - 15 Barahona de Brito, González-Enríquez, and Aguilar, “Introduction,” 3.
 - 16 Psomiades, “Greece,” 265, quoting data from Amnesty International.

- 17 Decision 683/1975, cited in Alivizatos, *Les Institutions politiques*, 547.
- 18 Owing to lack of reports or data on these procedures, which took place more than thirty years ago, it is not possible to say how many officers were vetted in the late summer of 1974.
- 19 Alivizatos and Diamandouros, "Politics and the Judiciary," 38–39.
- 20 The citizen was an Athenian lawyer, Alexandros Lykourazos.
- 21 Article 134 of the Criminal Code of 1950.
- 22 The original legislation dated back to 1924. Relevant legislation included the Legislative Decree 687/1948, dating from the civil-war period, and Law 165/1967, from the initial period of the Greek Colonels' regime (Alivizatos, *Les Institutions politiques*; Roussos S. Koundouros, *He Asfaleia tou Kathestotos: Politikoi Kratoumenoi, Ektopiseis kai Taxeis sten Hellada* [Regime Security: Political Convicts, Deportations and Social Classes in Greece, 1924–74] (Athens: Kastaniotis, 1978), 25–26).
- 23 The five were Georgios Papadopoulos, Stylianos Pattakos, Ioannis Ladas, Michael Roufogales and Nikolaos Makarezos. Ioannides was not to be found. The island was Kea, southeast of Athens.
- 24 Interviews with attorneys who assisted in private lawsuits and with victims of torture; Salonika, December 30, 2003, and January 5, 2004.
- 25 Alivizatos and Diamandouros, "Politics and the Judiciary," 46–47. A breakdown of the charges by defendant would require lengthy research in the archives of various courts in several Greek cities (Athens, Salonika, Chalkida, Tripoli, Chania, Amfissa, etc.) where the trials took place in 1975–76. Access to this material would require official permission from the highest authorities of the justice system.
- 26 Greece at the time had no regional authorities and was territorially organized along the French prefectural system. There were 52 prefectures and 147 provinces, totaling 199 regional officials. The prefects and province governors were appointed by the incoming government at each government turnover.
- 27 Private communication with Professor Nikolaos K. Hlepas, a Greek expert on local and regional government.
- 28 In this and the following section I have benefited from discussions with and material provided by Dr. Michalis N. Pikramenos, judge at the Council of the State, who has written extensively on the subject.
- 29 Dimitri A. Sotiropoulos and Dimitris Bourikos, "Ministerial Elites in Greece, 1843–2001: A Synthesis of Old Sources and New Data," in Pedro Tavares de Almeida, Antonio Costa Pinto, and Nancy Bermeo, eds., *Who Governs Southern Europe? Regime Change and Ministerial Recruitment, 1850–2000* (London: Frank Cass, 2003), 179. For details, see Kleomenis S. Koutsoukis, *Political Leadership in Modern Greece: Cabinet Elite Circulation and Systemic Change, 1946–1976* (Athens: Athena Publishing, 1982).

- 30 Michalis Pikramenos, *He Dikastike Anexartisia sti Dine ton Politikon Kriseon* [Judicial independence in the turbulence of political crises] (Athens: Ant. N. Sakkoulas, 2002), 205.
- 31 Ibid., 145, 180, 218–19, 223.
- 32 Ibid., 315.
- 33 Ibid., 294.
- 34 The act also exempted two vice presidents of the Court of Cassation who had obtained their posts in the fall of 1973 and were not vetted in 1974; this was a case of favoritism on the part of the transition government and an instance showing that patronage was at work under all regimes.
- 35 Legislative Decree 74/1974, on disciplinary law, which modified provisions of Legislative Decree 962/1971 on the same subject.
- 36 Pikramenos, *He Dikastike Anexartisia*, 232.
- 37 Alivizatos and Diamandouros, “Politics and the Judiciary,” 39.
- 38 Pikramenos, *He Dikastike Anexartisia*, 300–301.
- 39 Presidential Decree 652/1974.
- 40 Legislative Decree 88/1974.
- 41 Resolution E/1975.
- 42 Legislative Decree 88/1974, Presidential Decree 652/1974, and, additionally, Presidential Decree 653/1974.
- 43 Pikramenos, *He Dikastike Anexartisia*, 305.
- 44 Michalis Pikramenos, *He dikastiki anexartisia sti dini tis politikis krisis* [Judicial independence in the vortex of political crisis] (Athens: Antonis Sakkoulas, 2002), 306.
- 45 Interview with university professor who participated in the process of dejustification, Thessaloniki, January 5, 2004.
- 46 Panayotis Lambrias, *Gia te Demokratia* [For democracy] (Athens, 1977; a collection of Lambrias’s speeches and articles, published as a pamphlet), 27.
- 47 Alivizatos and Diamandouros, “Politics and the Judiciary,” 34.
- 48 Constantine P. Danopoulos, *Warriors and Politicians in Modern Greece* (Chapel Hill, NC: Documentary Publications, 1984), 135.
- 49 Psomiades, “Greece,” 263.
- 50 Alivizatos and Diamandouros, “Politics and the Judiciary,” 47, 51, 58.
- 51 Danopoulos, *Warriors and Politicians*, 137–38.
- 52 Psomiades, “Greece,” 258.
- 53 Alivizatos and Diamandouros, “Politics and the Judiciary,” 47.
- 54 Interview with victim of torture, Salonika, January 5, 2004.

CHAPTER 4

Institutional Transformation
and the Choice Against Vetting
in South Africa's Transition

Jonathan Klaaren

INTRODUCTION

This chapter analyzes the South African (in)experience with vetting practices during the transition from apartheid to constitutional democracy over the years from 1990 to 1996. It argues that there was no institutional practice of vetting in the South African transition — although there were certain events akin to vetting, such as the operation of the Goldstone Commission — and, furthermore, that different sectors of South Africa's administrative and power structures transformed themselves through other means. The political choice made against vetting was reinforced by some legal doctrines and their constitutional entrenchment, in particular the competence of existing public service institutions and strong labor and administrative justice rights.

Different institutions and sectors in South Africa were transformed differently in the transition. The public service sector was transformed during this time by processes of rationalization and demographic change. Political parties did not undergo any vetting of their membership either, but were rather influenced directly by the changed political currents. Significant institutional practices of personnel turnover were implemented in the judiciary and also in the security services. The key position of the judiciary and the new eleven-member Constitutional Court within the politics of transition demanded that certain rules and processes be negotiated regarding the composition of the courts and the selection of its members. The Judicial Service Commission (JSC) was established to play this role. Within the security services, initial dismissals were reactions to media revelations or ad hoc investigations, while government and liberation intelligence services were formally amalgamated at a later stage and a statutory basis for vetting on grounds of loyalty to the state was instituted. Concluding that the content of concepts such as administrative justice is variable and contested, particularly in times of transition, this chapter aims to highlight the institutional influences on our understanding of such concepts.

Situated within the field of transitional justice, the core analytic definition of “vetting” used here will follow that of the ICTJ research project. Thus, the definition used is that of processes of public power that involve the examination of employment and other records of individuals for the purposes of hiring or firing on grounds of past human rights behavior. Personnel selection procedures involve similar examination for such purposes, but the criteria on the basis of which such screening takes place, what I shall call “grounds of transition,” encompass but are broader than the category of past human rights behavior. Grounds of transition refer, then, to human rights records (as did the Goldstone Commission), but, more often, to status as an apartheid or homelands government employee or as a member of a liberation movement, or to record of activity undertaken for the government or the liberation movement.¹ Thus, personnel selection procedures were not in themselves vetting procedures, but, in the instances where they involved a (minimal) concern for individuals’ human rights records, did include processes akin to vetting. Finally, “grounds of transition” do not include those grounds (such as formal educational qualifications) that are unrelated (or at most distantly related) to the political transition from apartheid to democratic nonracial government in South Africa. As is addressed further below, the influence of affirmative action policies complicated the issues examined here. I have not considered race on its own as a ground of transition.

BACKGROUND

A brief sketch of the dates and significant events of the South African transition from apartheid to constitutional democracy can provide some context for this analysis. The transition had two aspects of particular interest for a study of the practice of vetting: the broad series of political events leading to the adoption of the 1996 constitution² and the more narrow series of developments related to the establishment and operation of the Truth and Reconciliation Commission (TRC) in 1995 (which continued beyond 1996).

Without sketching the rise and fall of apartheid in South Africa, one can see the transition as initiated by two events at the beginning of February 1990.³ The South African State President F. W. de Klerk, himself recently in power, released from prison the world’s most famous political prisoner, Nelson Mandela. Following prior negotiations with Mandela, this release was unconditional. Furthermore, de Klerk lifted the ban not only on Mandela’s political party, the African National Congress (ANC), but also a number of other organizations including some direct political rivals of the ANC. The releases and

the unbanning of organizations were followed by the launch of the Convention for a Democratic South Africa (CODESA) in December 1991. CODESA, however, collapsed in mid-1992 after the parties failed to reach agreement on a negotiated settlement and constitution. Following what one observer has described as “social upheaval, mass action, and escalating violence,” the parties agreed to restart negotiations in March 1993 and by the end of that year negotiated an interim constitution that essentially took effect during the first nonracial elections held on April 27, 1994.⁴ Over the next two years, the democratically elected parliament negotiated a final constitution, adhering in the process to a set of agreed-to constitutional principles providing for a bill of rights, the separation of powers, and so on. On its second try, the 1996 constitution was certified by the Constitutional Court and took effect in February 1997, signifying (at least for the purposes of this chapter) the end to the South African transition.

Although the South African transition itself was politically dramatic, one of its central institutional forms was even more so—the operation of the Truth and Reconciliation Commission.⁵ The events directly leading to the establishment of the TRC have attracted much analysis and reflection.⁶ One important source of the movement towards establishing the TRC relates to the developments concerning legal guarantees of indemnity and begins in 1990.

The initial talks between the liberation movement and the F. W. de Klerk-led apartheid government resulted in a series of minutes and statements. Some regard the Pretoria Minute of August 1990 as the place where the compromise political deal truly began, with the ANC suspending its armed struggle and both parties committing themselves to inclusive negotiations.⁷ In these initial negotiations with the government, the ANC was concerned about providing protection from legal prosecution for its returning exiles. The apartheid government matched this interest with concern for persons within its own constituency who had engaged in rights abuses. The result was the Indemnity Act 35 of 1990, modeled on an international definition of political offences. In terms of this law, de Klerk as the state president could grant indemnity to any person or category of persons upon publishing certain facts in the official government gazette. After a series of later controversies, in which members of the government and its constituencies appeared vulnerable to criminal charges without benefiting from the protection of this definition in terms of the indemnity act, the apartheid government pushed through the Further Indemnity Act of 1992, which gave the president power to grant indemnity by discretion.⁸

This statutory framework of indemnity was thus in place during the negotiations over the interim constitution. At the end of these talks, the

ANC and the National Party mandated the writing of a clause (sometimes termed the “postamble”) to the constitution taking effect in April 1994. This clause ensured that a mechanism for amnesty would be set up. Pursuant to this clause, the TRC was established by the Promotion of National Unity and Reconciliation Act 34 of 1995. The TRC was mandated to grant amnesty from prosecution if alleged perpetrators made full disclosure of their human rights violations and if those violations were proportional to the achievement of political objectives. It was also mandated to institute a process for granting reparations and reporting on human rights violations and making recommendations for truth and reconciliation more generally.⁹

THE PLACE OF VETTING IN THE SOUTH AFRICAN TRANSITION

With the above account of the political transition and the establishment and operation of the TRC as background, it is worthwhile to locate the practice of vetting within the South African transition. Perhaps the evidence of the South African choice on the practice of vetting can be most clearly seen in the *Truth and Reconciliation Commission of South Africa Report*. Published in October 1998, volume 5 of the Report made the following recommendation in its three paragraphs dealing with the lustration¹⁰ policy:

- 17 The Commission gave careful consideration to the possibility of lustration as a mechanism for dealing with people responsible for violations of human rights. As used in several Eastern European countries, lustration (from the Latin meaning to illuminate or to purify by sacrificing or purging) involves the disqualification of such persons from certain categories of public office, or their removal from office. Other international and South African commissions have commented on this matter. For example, the report of the Skweyiya Commission recommends that “no person who is guilty of committing atrocities should ever again be allowed to assume a position of power.”¹¹
- 18 The current opinion in International Law is that lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights, and that it should not apply to positions in private organizations.
- 19 The Commission decided not to recommend lustration because it was felt that it would be inappropriate in the South African context.¹²

Despite perceiving international law as permitting lustration in limited circumstances in the public service,¹³ the TRC did not recommend the use of lustration in those circumstances. The TRC's choice against lustration went quite far. Even after explicitly raising and considering the matter, the TRC chose not to recommend the disqualification from public service of personally responsible human rights violators who would be a danger to human rights.

From the South African point of view, the TRC's decision demonstrates the ongoing power of the compromise negotiated between the liberation movements and the apartheid government over employment stability. The source of this political compromise lay in the balance of power between the two sides. There was no clear winning side; "the only way out of an untenable stalemate was to negotiate."¹⁴ The enactment of this political compromise took the form of both political agreements and doctrines of law. As noted above, its clearest written form is the interim constitution and its postamble. As discussed below in relation to the public sector, the political and constitutional choice made against vetting at the start of the South African transition was reinforced by the continuing influence of legal doctrines of competence and rights during the period from 1990 to 1996.

The political reasons behind the choice against vetting also meant that at least some public institutions delayed initiating institutional transformation until after this period, as for instance happened in the case of the criminal justice system. The establishment of a high-profile multidisciplinary investigating unit located within the Department of Justice, the Directorate of Special Investigations (the Scorpions), and the National Directorate of Public Prosecutions (NDPP) in 1998 was motivated by the need to have certain structures within the criminal justice system completely free of any organizational attachment to those of the apartheid order.¹⁵ In this sense, the establishment of the Scorpions and the NDPP is similar to the establishment of the Constitutional Court (discussed more fully below), but, unlike the establishment of the Judicial Service Commission (also discussed more fully below), the creation of these separate prosecution and investigatory agencies occurred after the immediate phase of transition from 1990 to 1996.

THE PUBLIC SERVICE

There was no vetting legislation in the South African transition generally applicable to the public service. Nor was there any formal practice of vetting generally applied within the public service sector. No generally applicable

vetting law was enacted within the national sphere nor were there vetting laws adopted in the homelands (before 1994) or in the nine newly established provinces (after 1994). This is a crucial feature that must be appreciated to understand the place of vetting in the South African transition.

The public service did not engage generally in vetting during the transition.¹⁶ As the acting director general of the Department of Public Service and Administration (DPSA) is on record as having stated: "In so far as the human resource management area in the Public Service is concerned, staff was not subjected to security vetting as part of the transitional phase in the country. As such, processes of the nature alluded to in the [ICTJ] project extract... have thus not taken place."¹⁷ This point was confirmed by a number of line departments.¹⁸

This does not mean that the public service was not undergoing a radical transformation during this transition. It was. However, this transformation did not occur through a process of vetting of public servants. Instead, the public service was subjected to different processes of transformation during this period.¹⁹ Two processes were of particular importance: rationalization and affirmative action.

The dominant process during the period of transition was one of "rationalization." Rationalization was primarily aimed at amalgamating the various existing but fragmented apartheid-era public services. These were the public services of the homelands as well as the public service of apartheid South Africa. As the Public Service Commission put it: "The legacy of the apartheid past was a fragmented collection of public services serving the former Republic of South Africa, the TBVC States [that is, the "independent" homelands of Transkei, Bophuthatswana, Venda, and Ciskei] and the self-governing territories. There were eleven public services in all, each with its legislation, structures, systems, personnel composition and organizational cultures. Out of this inefficient and ineffective fragmentation of public personnel corps, a new unified Public Service has to be built."²⁰ This process of rationalization was carried out within the constitutional constraints of section 237 of the interim constitution.²¹

Although it was perhaps not headlined, the process of rationalization had another organizational dimension beyond consolidation: rightsizing or downsizing the number of employees.²² While the numbers of existing public servants were very uncertain and contested, the total number of civil servants decreased during the period of transition as part of these organizational consolidations. Furthermore, beyond its organizational aspects, the process of public service transformation during this period of transition included initiatives directed at racial and gender representativeness (see below) as well as

initiatives meant to promote management skills and political capacity within the civil service.²³

This process of rationalization began in earnest in 1995, the year after the adoption of the interim constitution. In that year, twenty-three national departments submitted proposals for rationalization of their “full organizational structures,” while three national departments and all provincial administrations had submitted proposals for rationalization “at management level only.”²⁴ The executive functions of the Public Service Commission were transferred to the minister for the Public Service and Administration only on April 12, 1996.²⁵

These organizational aspects of rationalization were more significant in public service transformation than terminations of public servants on individual grounds. The public service legislation as amended in 1994 allowed for the early or premature termination of public servants within the management echelon with full benefits. This was termed “taking the early retirement package.” The legislation allowed for a number of grounds (some quite vague) for this termination: retirement to the advantage of the state, rationalization, continued ill health, the interest of the public service, and discharge by the president. This policy was in effect from January 1995 to February 1996. The implementation of this policy during this period of transition, however, saw relatively small numbers of persons discharged.²⁶ Although there may have been elements of constructive discharge in some instances, this process of early retirement was essentially a voluntary one and was under the executive direction of the renamed structure (the Public Service Commission) that had been in control of the national public service during the apartheid era.²⁷

A second important process in the transformation of the public service in this period was one of affirmative action. During the period of transition, the public service was changed from one that was markedly white (at least in its more senior ranks) to one that began to reflect the demographics of the South African nation. The management echelon of the public service was 94% white and 6% black in 1994. This composition contrasted with the population demographics that were nearly opposed: 87% black and 13% white in mid-1995.²⁸ By October 31, 1997, those percentages had changed to 66% and 34%.²⁹ This process was, however, underway before the transition, as greater and greater numbers of the black majority in South Africa found positions within the civil service. As with rationalization, the process of changing personnel composition had a great impact on the transformation of the public service. Indeed, rationalization sped up the process of changing personnel composition since representation of black persons within the homeland administration was greater than that within the pre-1994 South African public service.

POLITICAL PARTIES

What was true for the public service and the formal structures of the state—that there was no general rule or practice of vetting—was also true for the more informal structures, that is to say, the political parties. By and large, the principal South African political parties did not engage in vetting of their own membership during the transition.³⁰ Political parties do not self-report having undergone vetting, nor does evidence emerge from other sources.³¹ For instance, the Democratic Alliance (reporting on behalf of its predecessor party, the Democratic Party) states that it “did not have specific vetting requirements applicable to its staff, members or public representatives relating to the transition to democracy.”³²

During the transition, persons alleged to have been involved in human rights abuses were routinely appointed to significant positions within the major political parties. For instance, in 1993, the ANC appointed Andrew Masondo as political commissar of its armed wing, Umkhonto weSizwe (also known by the acronym MK), despite allegations made by former ANC detainees that he was involved in incidents of torture in the ANC detention camps in exile, and despite his earlier removal from the ANC’s national executive in 1985 after an internal investigation.³³ ANC internal investigations into allegations of abuse made findings of indirect involvement of senior party figures who later rose to occupy high government positions, including Joe Modise, who became the defense minister after 1994, and Jacob Zuma, who became the deputy president in 1999.

Even with respect to its own internal investigations into alleged abuses, such as the Skweyiya Commission and the Motsuenyane Commission, the ANC position was that the organization itself would not take action and that, instead, the findings of these investigations would be referred to and dealt with by the TRC.³⁴ Amnesty International noted specifically that these reports stopped short of recommending that no one implicated in human rights abuses should be allowed to hold a senior post in the ANC or in any future government of South Africa or in its security forces.³⁵

WHY DID THE CHOICE AGAINST VETTING STICK?

The political choice against vetting made in 1990 as identified above was reinforced by an intertwined set of organizational factors and legal doctrines during the subsequent six years. These factors included (1) constitutional pro-

visions, including some that gave, at best, uncertain legal authority for enactment of vetting legislation and protection for existing powerful public service institutions, and (2) strong legal protections for the labor rights of public service employees and for the due process concerns of administrative justice.

The first factor reinforcing the initial political decision against vetting was a lack of constitutional competence to enact such laws at the national level (i.e., a lack of legal authority). This was coupled with the considerable organizational power of the public service oversight institutions.³⁶ From 1990, the white-dominated apartheid parliament certainly would have been competent to enact such legislation under the pre-1994 constitution. In principle, that parliament was supreme and (notoriously) competent to enact nearly any piece of legislation it wished to. However, perhaps for readily apparent reasons of self-interest, no vetting legislation was either considered or enacted by this white-dominated parliament during the transition.³⁷ And the subsequent power of the first post-apartheid parliament after 1994 and the strength of its political will must be considered alongside two legal texts: the postscript (the final [and unnumbered] section of the interim constitution) as well as section 236, one of the transitional clauses of the interim constitution.

Entitled National Unity and Reconciliation, the postscript is worth quoting at length. It provided in part: "In order to advance... reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, parliament under this constitution shall adopt a law determining a firm cut-off date... and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed." As with any text, this clause remained open to interpretation, both in courts and in policy processes. An amnesty may be limited to the granting of immunity from criminal and/or civil liability and thus need not constitute a bar to vetting procedures. There is no judicial decision specifically interpreting this clause in the context of vetting procedures. In government policy during the transition, however, the scope of the amnesty appeared to be understood such that this clause not only shielded beneficiaries from criminal and civil liability, but that it further shielded officials from measures such as vetting.

Judge John Didcott (one of if not the foremost judicial critic of apartheid serving within that system and later a judge on the Constitutional Court) wrote of the postscript in the following terms: "Once the truth about the iniquities of the past has been established and made known, the book should be closed on them so that the catharsis thus engendered may divert the energies of the

nation from a preoccupation with anguish and rancour to a future directed towards the goal which both the postscript to the [interim] constitution and the preamble to the [TRC] statute have set by declaring in turn that... the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.”³⁸

In the case that Didcott was considering, *AZAPO & Others v President of the Republic of South Africa*, the Constitutional Court rejected a challenge to the constitutionality of the TRC legislation.³⁹ Although all members of the court accepted that the TRC act infringed upon the right of the victims to access their judicial remedies (rights that were protected for the first time in South Africa in the interim constitution), the court held that these rights could be limited in the interests of reconciliation. The decision of the court depended heavily on the postscript.⁴⁰

Although it is inherently a matter of speculation, significant constitutional arguments based on the postscript could well have been raised as obstacles to any law of vetting that parliament wished to consider. It is interesting to contemplate, however, whether a practice of vetting designed to achieve *preventive* rather than punitive goals would have fallen under the apparent prohibition of the postscript. Even staying within the understanding of the issues as expressed in *AZAPO*, much could have been said in favor of the constitutionality of preventive vetting. Arguably, such a practice would have had the advantage of bolstering the transition by increasing the legitimacy of the public institutions. Such a practice might have been judged constitutional since *AZAPO* expresses a preference against punitive goals and demonstrates an overriding concern to support the transition.

A second legal text, section 236 of the interim constitution, entrenched a set of provisions governing transitional arrangements for the public administration. Prominent within this constitutional section was the rule contained in section 236(2): “A person who immediately before the commencement of this constitution was employed by an institution referred to in subsection (1) shall continue in such employment subject to and in accordance with this constitution and other applicable laws regulating such employment.” This legal text gave power to those officials arguing against vetting. According to the acting director general of DPSA, the reason that there were no vetting processes during the transition was “in the main... because of an approach that the position of staff in the Public Service be protected during the transitional phase. (This approach was enshrined in section 236 of the interim constitution, 1993.)”⁴¹

Effectively, parliament shared competence in this area with the existing

set of entrenched public service commissions. The strong legal position of the public service before 1994 did not quickly change. Instead, the interim constitution provided specific institutional protections for the public service. As part of its creation of new public agencies, the interim constitution established one national Public Service Commission as well as nine Provincial Service Commissions.⁴² To a great extent old wine in new bottles at their inception, these public service commissions essentially were continuations of pre-interim constitution structures intended to manage more than oversee the operation of the public service and operated in terms of pre-interim constitution laws governing the public service.⁴³ They had operated in the past in a manner that zealously safeguarded the employment rights of (largely white) civil servants and they largely continued to do so during the years of the transition from 1990 to 1996.⁴⁴ These institutional protections were supplemented by a body of legal rules and norms since the interim constitution made extensive and explicit provision for the general continuation of laws applicable from the pre-interim constitution period. In particular, this meant that the Public Service Act—governing the terms and conditions of public employees—survived the transition.

In any case, even assuming that the parliament possessed at least some degree of constitutional competence to enact a generally applicable vetting law, other legal provisions would have strongly operated against such a move. Any such law would have faced certain challenge based on provisions of the Bill of Rights, introduced in early 1994. Moreover, these provisions of the Bill of Rights were, of course, also applicable to the particular vetting laws and processes that were enacted. Thus, they form part of the legal background against which vetting was considered.

From the point of view of public employees, the Bill of Rights provided specific rights protection that could have been invoked by opponents of vetting and would have complicated the operation of any potential vetting legislation. This protection was in the form of labor rights and, perhaps even more powerfully, in the form of the interim constitution's legal guarantee of administrative justice contained in section 24. This right is approximately equivalent to the due process rights of other constitutions. This section provided all persons with a right in particular to "procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened." Although vetting processes would not necessarily violate such provisions, the implementation of vetting likely would have been complicated by the right to administrative justice. Indeed, from the point of view of the TRC, the administrative justice right became an obstacle to its efficient and quick

functioning. Much of the “legal firepower” of the TRC itself was spent on complying with legal guarantees of administrative justice.⁴⁵ Indeed, in a TRC setting closely analogous to that of vetting, administrative law came to the aid of an alleged apartheid perpetrator in the transition-era case of *Du Preez v Truth and Reconciliation Commission*.⁴⁶ This constraining experience of the TRC with rights of administrative justice demonstrates the power of these provisions in the South African legal tradition. Although this experience did not make a process of vetting impossible, it indicates that any vetting initiatives would have faced powerful (albeit not insurmountable) constraints stemming from the obligation of procedural fairness.

It is, of course, deeply ironic that a great part of the legal protection enjoyed by public employees against the enactment of vetting legislation derived from the more celebrated legal victories of the anti-apartheid effort. This was especially the case in the context of an individual public service employee faced with retrenchment (i.e., firing). Cases such as *Administrator, Transvaal v Traub*⁴⁷ and *Administrator, Transvaal v Zenzile*⁴⁸ upheld the rights of black or progressively minded and outspoken employees in the face of actions by apartheid bureaucrats. These cases were regarded at the time as victories against apartheid. However, they also entrenched legal norms of procedural and substantive protection in South African law that would in the 1990s be significant potential obstacles to instituting a vetting process.

PERSONNEL SELECTION PROCEDURES IN THE TRANSITION IN SOUTH AFRICA

As the last section pointed out, there was no law of vetting in the South African transition from 1990 to 1996. No vetting took place within nonsecurity components of the public service or within political parties. This is not to say that no personnel selection or security clearance procedures took place. Some did. In particular, personnel selection practices took place within the judiciary and within the security services.

BEGINNING TO TRANSFORM THE JUDICIARY

An episode of the transition that relates specifically to the personnel of the judicial branch was the impetus for a Constitutional Court made up of a new slate of judges. This aspect of the transition derives from sharply contrasting attitudes of the apartheid government and the liberation movement. For a number of decades, the African National Congress had consistently held

a skeptical attitude towards the personnel of the judiciary under apartheid. The ANC's view was that the majority of judges were stooges of the apartheid regime, apart from a few honorable exceptions such as Judge John Didcott. When constitutional issues began to be seriously debated within the ANC in the late 1980s, one of the most hotly contested within the liberation movement was the composition of the judiciary as well as the power of judicial review. For instance, in response to one internal proposal that apparently would have allowed at least some apartheid judges to continue to hold their seats, Pallo Jordan and others in the ANC suggested before 1990 that all members of the judiciary should resign and then be rehired by a new democratic regime.⁴⁹ In contrast, the apartheid government had belatedly and self-interestedly woken up to the value of an independent judiciary and of a bill of rights as structural guarantees for the rights of minorities in a constitutional democracy with a clear black majority. Both it and international opinion were thus strongly committed to maintaining rather than modifying the existing institutional independence of the South African judiciary.⁵⁰ This debate took place against the background of an existing judiciary that was nearly 100% white and male. The permanent appointment of the first judge who was not white did not take place until 1991.⁵¹

In the end, the interim constitution essentially kept intact the existing judiciary with two significant innovations. First, constitutional review power (the power to strike down parliamentary legislation on constitutional grounds) was given to first-instance judges (but not to the judges of the old-order apex court, the Appellate Division, now renamed the Supreme Court of Appeal). Second, while the vetting of sitting judges was a political nonstarter, the different starting points of the liberation movement and the government nonetheless set the stage for the establishment of the Constitutional Court.⁵² The establishment of the Constitutional Court thus owed much to a concern with the existing personnel of the judiciary. The creation of a new court with constitutional jurisdiction, but crucially also with newly appointed judges, can be seen as motivated in large part to make a decisive break with the past.

The Constitutional Court would embody that decisive break not only in terms of doctrine but also in terms of personnel.⁵³ Nonetheless, although the members of the new court were to be selected and appointed anew, the court was not a complete break with the personnel of the existing judiciary. Constitutionally, four of the eleven judges were required to be appointed from among the judges of the existing Supreme Court. Thus, a substantial portion of the personnel of the new Constitutional Court was mandated to have direct continuity with the existing judiciary. Furthermore, although it

was not a legal requirement, two of the remaining seven appointments to the Constitutional Court were in fact also judges of the existing Supreme Court. One of these nonmandated appointments was that of Judge Didcott. Moreover, there was significant participation by the judiciary and by the legal profession in the actual process of nominating the judges for the court. Six of the eleven appointments required the consultation of a constitutionally mandated body, the Judicial Service Commission (JSC).⁵⁴ In order to form its opinion, the JSC chose to interview a number of candidates. After a short but fierce period of controversy, it was resolved by the JSC that the process of interviewing and recommending candidates for these appointments would be open. The JSC thus conducted a transparent process for these six appointments, essentially along the lines by which the media is usually permitted to view public and open processes of the courts. In this interviewing process, the members of the JSC asked candidates questions based on their résumés as well as questions regarding their views on the legal system.⁵⁵

As the above demonstrates, the JSC was designed to and did play an important role in the selection of the Constitutional Court judges. It also was designed for and has played a role in the selection and appointment of lower-rank judges. In this sense, one can point to the JSC as a personnel-selection institution. While retaining approximately the same size, the judiciary itself had changed from having one black male judge and two white female judges in May 1994 to a state where the justice minister could point to “14 white females, 42 indigenous African males, 8 indigenous African females, 8 coloured males, 1 coloured female, 11 Asiatic males and 2 Asiatic females” out of 214 judges.⁵⁶ By 2003, 60% of the judges were post-apartheid appointments. During the time of transition, the debates and discussions within the JSC covered in part grounds of transition, although they mostly focused on more institutional matters of judicial competence.⁵⁷ For instance, the membership of judges in the Afrikaner Broederbond (a secret brotherhood that was closely linked to the National Party) was a matter critically taken into account by the JSC in relation to the promotion of certain old-order judges, although the JSC has also recommended the appointment of some persons with that background.⁵⁸

PERSONNEL SELECTION AND SECURITY CLEARANCES IN THE SECURITY SERVICES

The security services sector did undergo at least one formal and statutory personnel selection process during the transition. This sector saw the clearest

separation of the old and the new regimes at the start of the transition, at least with respect to formal military and intelligence structures. Thus, even though there were numerous organizations involved, the transition witnessed the merger of two broad sets of military/intelligence organizations, one from the side of the liberation movements and one from the side of the government.⁵⁹ These different organizational structures were put together during the years from 1994 to 1996, although on the military side the processes extended beyond 1996.

INTELLIGENCE

The period from 1990 to 1994 can be characterized as one in which President F. W. de Klerk was attempting to regain civilian political control over the intelligence services but was unable to wield much power in this effort. For instance, de Klerk repeatedly stated that no witch hunts were to be conducted, apparently needing to make this commitment in order to attain control over these services. The few high-profile sackings of senior intelligence officials that occurred during this period were all conducted in response to exposure by journalists or by a judicial commission of inquiry without any powers of enforcement or prosecution, the Goldstone Commission.⁶⁰ In December 1992, de Klerk dismissed twenty-three senior commanders of the military intelligence in response to evidence uncovered by the Goldstone Commission. However, the primary reason cited for the dismissal of these senior officials (including two generals and four brigadiers) was their apparent involvement in destabilizing the ongoing negotiations process.⁶¹ Although the Goldstone Commission had some formality to its investigation, these actions of dismissal were immediate responses to its reports and did not form part of any sustained program of vetting.

During this period (as well as prior to it), there were continued contacts between the National Intelligence Service (NIS), as the primary intelligence service on the side of the government, and the MK Department of Intelligence and Security (MK-DIS), as the primary intelligence structure for the ANC on the side of the liberation movements. The NIS had been selected by de Klerk as his primary intelligence instrument for the transition from apartheid. Thus, the NIS was put in the position of performing the functions of a powerful yet reformist state agency in the midst of the transition. This position of power and the ability of the two intelligence agencies to shape their own relationship both with each other and with their respective principals contributed to the relatively warm relations between the NIS and MK-DIS. In 1992, the head of the MK-DIS indicated the degree of consensus that existed in stating: "In

discussing the future of intelligence in our country, we cannot negate the fact that we, as intelligence actors, constitute a tragic legacy; a legacy of opposition to one another—some of us struggling against apartheid, others defending it—actions that were dictated by the very nature of our highly politicized roles respectively. Today, a new mission must be determined for the South African intelligence community—a mission which is in line with the desired goal of a non-racial democratic order.”⁶² Along these lines, there were arguments made within the ANC for retention of the NIS as it was. Beyond its contribution in the negotiations (as described above), the NIS was regarded by the ANC as possessing “assets and capabilities that the ANC would not want to lose, including sources, information on both the white right wing and extremists in black parties such as Inkatha, technological capabilities, and greater professional training than in the ANC.”⁶³

It is within the above context that we can outline and assess the personnel selection done in the security sector. Consider the experience of the South African Secret Service (SASS). SASS is one of the two South African intelligence services created in 1994 out of the NIS and the amalgamation of liberation-movement intelligence services. It is a partner service to the National Intelligence Agency (NIA). NIA has primary responsibility for domestic intelligence and SASS has primary responsibility for foreign intelligence. SASS has indicated that “no vetting [i.e., security clearances such as background checks on issues of affiliation or screening for human rights abuses]⁶⁴ was done as a prerequisite to join the new intelligence structures established by the Constitution and the Intelligence Services Act.” Instead, the service noted the existence of an “amalgamation process to incorporate all the intelligence structures.”⁶⁵ SASS has reported that “[d]ue to the diversity of backgrounds and various other practical reasons, [it was] decided that security screening before amalgamation would not be a prerequisite, but to do a vetting thereafter. [SASS] conducted its own vetting and was one of the first departments to complete the vetting process. It needs also to be mentioned that during the early 1990s (pre-1994), severance packages were offered to members in the statutory Intelligence Services in an attempt to sever structures from members who could jeopardize the amalgamation process.”⁶⁶

As the experience of SASS demonstrates, there were a number of overlapping practices in the transition of the intelligence services sector. The creation of the new intelligence services out of elements of government and liberation intelligence services during this period included pre-amalgamation voluntary retirement incentives as well as post-amalgamation security screening⁶⁷ and post-amalgamation certification.⁶⁸ Of the approximately four thousand

members of the new civilian intelligence services, about one-half came from the previous governmental intelligence services, one-quarter from the ANC intelligence services, and the rest from homelands and other services.⁶⁹

This 1994 restructuring of the intelligence services (the amalgamation) was, at most, only in very small part a move to cleanse the services of individuals with backgrounds involving human rights violations or indeed of particular individuals at all. As demonstrated by the relatively warm relations between the intelligence services, there were other factors that loomed larger than changing the personnel. As one commentator put it: "The reason behind the changes in the intelligence and security structures was partly a result of the general government restructuring following independence, but also to allow for the integration of the MK-DIS, along with all other intelligence services in the country, into the new national intelligence structure."⁷⁰

As indicated above, it was after the formal amalgamation that persons in the new intelligence services were subjected to a check for security clearance. The exemption from a pre-employment security clearance was a departure from prior governmental practice and was understood within the intelligence services to be a concession to those members not previously employed in government. In order to understand the practice of security clearance that developed at this time, one can make a distinction between two different types of security clearances. One type is a state information security clearance and is an intelligence-oriented understanding that extends to loyalty to the state.⁷¹ Another type of security clearance is more corporate-oriented and refers to procedures, such as checking on fraudulent curriculum vitae or qualifications as well as criminal records, and so on, and does not necessarily include assessing loyalty to the state.⁷² It was the first rather than the second type of security clearance that was implemented during this period. To the extent, then, that human rights criteria were not the critical ones in the security clearances that were actually carried out, this practice was not one of vetting. Moreover, in this type of security clearance, the criteria adopted for the security clearance and the application of those criteria may have varied significantly in this period of transition.⁷³

Beyond (but also linked to) the security clearance, the other primary post-amalgamation process in the new intelligence services affecting personnel through examination of records was that of certification. The central legislation for the amalgamation within the intelligence services was the Intelligence Services Act 38 of 1994. Section 3 of this act regulated the process and essentially established the new National Intelligence Agency (NIA) and the South African Secret Service (SASS) out of members of the statutory Bureau

for State Security, the ANC Department of Intelligence and Security, the Bophuthatswana Internal Intelligence Service, the Transkei Intelligence Service, and the Venda National Intelligence Service. Members of other services of other political parties and self-governing territories (e.g., KwaZulu) could be included if they applied to the director-general within a set period.⁷⁴ It was necessary that each member be a South African citizen and that he or she feature on a personnel list submitted by the head of each organizational component. NIA and SASS were thus formally established on January 1, 1995.⁷⁵

Section 8 of the Intelligence Services Act regulated the post-amalgamation personnel selection by providing for a security screening investigation by the newly created intelligence structure itself in section 8(1)(a) and then providing for evaluation of the collected information by the deputy president or the cabinet minister charged with intelligence. For the relevant period, the cabinet member charged with intelligence was Deputy President Thabo Mbeki, the current president of South Africa. According to section 8(1)(b) of the Intelligence Services Act, the condition of appointment of a member of the intelligence services was that the deputy president would be “reasonably of the opinion that such person may be appointed as a member without the possibility that such person might be a security risk or that he or she might act in any way prejudicial to security interests of the Republic.” Obviously, this was a standard that was open to interpretation by the deputy president. There appears not to have been any policy made in order to guide his interpretation. Section 8(2) of the act then provided for certification by the deputy president of such “appointability” of a member. However, the certification of appointability was not the end of the matter; there was the further possibility of the deputy president withdrawing that certificate of appointability upon gaining new or different information regarding that member’s appointability. Thus, the members of the intelligence services were placed under the control of a civilian politician, in particular that of Thabo Mbeki occupying the post of deputy president.

This post-amalgamation personnel selection process (i.e., the security clearance and the certification of appointability) of sections 8(1) and 8(2) of the Intelligence Services Act only applied to persons appointed anew after the 1994 establishment of the agency and the service. For the bulk of the members who were amalgamated directly from the prior existing services, the equivalent provision was contained in section 8(3) of the act. In terms of section 8(3), if the deputy president “obtains information regarding [such] a member... which causes him to be reasonably of the opinion that the per-

son could be a security risk or could possibly act in any manner prejudicial to security interests of the Republic, such member shall be deemed unfit for further membership of the Agency or Service.” Although this standard also was open to interpretation by the deputy president, it contained more protection against dismissal for these existing members than for the new members governed by section 8(2).

There are several points worth noting regarding this intelligence services amalgamation legislation. First, the deputy president effectively had the final say. The model of personnel selection adopted is thus one of an agency newly established via amalgamation of existing units, in a process operated by a very senior political head, and with one key part of the process—that of security clearance—conducted by the newly established agency itself. Second, the members of the new service taken in from preexisting units would only be evaluated in terms of information obtained after amalgamation (rather than in terms of information then available to the preexisting unit). Thus, full information sharing was not established before amalgamation. Third, it bears emphasizing that the legal standard for the deputy president’s discretion in section 8(3) with respect to members of the new service who were members of preexisting units is more objectively phrased than for the ongoing selection process of sections 8(1)–(2). For preexisting members, the standard for non-appointability was thus higher. It was more difficult for the deputy president to be of the opinion of the existence of security risk. On the face of the law at least, as demonstrated in these last two points, there were greater protections thus provided for existing members than for new members.

As for the impact and effect of this law, a detailed study of the operation of this personnel selection in practice remains to be done. However, some features—beyond the generally held observation that this process of integration of the intelligence services was successful—are clear. First, it does not appear that grounds of transition figured prominently in this process—there is no indication that an individual’s record as a human rights violator or status as a government/liberation forces member was taken into account to any significant extent. Indeed, at least two of these statuses—participation in government or liberation forces—were made legally equivalent. Second, there remained significant noncooperation from the part of the intelligence sector with the new democratic regime, at least initially. In particular, the leaders of the intelligence agencies refused to tell newly elected President Nelson Mandela in 1994 the names of the informers used against the liberation movements.⁷⁶ This indicates that the personnel selection processes

likely remained contested and variable. The secrecy and lack of information sharing during this period was, however, not a break with bureaucratic tradition within the intelligence sector. From 1989 to 1994, the intelligence community had also withheld information from State President F. W. de Klerk.⁷⁷

THE ARMED FORCES

Occurring more slowly than the process within the intelligence service, the armed forces of the liberation movements were absorbed into the South African military in an integration process that was planned by commanders from both sides themselves.⁷⁸ After a series of off-the-record meetings in 1992 between South African Defence Force (SADF) and Umkhonto weSizwe (MK) commanders, as well as more official and inclusive meetings in 1993–94, the Joint Military Coordinating Committee (JMCC) made a formal plan for the integration process including the establishment of certified personnel registers. In this process, the approximately 28,000 MK members, 6,000 members of the Azanian People's Liberation Army (APLA), and 11,000 members of the Transkei, Ciskei, Venda, and Bophuthatswana militaries were scheduled for integration with the 90,000 members of the South African Defence Force.⁷⁹ In the integration process, individuals were assessed in terms of a rank structure, a process that caused difficulties for the liberation movement armed forces that had not operated on the basis of rank.⁸⁰ In the end, fewer MK and APLA military personnel participated in the integration than had been expected. Thus, in 1998, about 16% of the South African National Defence Force (SANDF, which replaced the SADF in 1994) uniformed component (of 73,500) were from MK and less than 7% from APLA.⁸¹ Nonetheless, a process of rationalization was also begun with respect to the armed forces.⁸²

The JMCC oversaw the process of integration and understood its mandate to include oversight over the process of security clearances (which was an institution [established in 1980] separate from that of the police and that of the intelligence organizations). There was a “natural” fear on the part of the “comers-in” that the process of security clearances could be used to keep out new members of the armed forces.⁸³ However, those implementing the clearance process in the SANDF made some allowances that were guided by the governmental policy of reconciliation and that had the effect of facilitating integration. These included a delay before a full-scale process of security clearance evaluation would be conducted as well as an explicit appreciation for cultural differences.⁸⁴

THE POLICE

The integration of the police forces differed from that of the armed forces in part because the liberation movements had few if any personnel with relevant policing experience or indeed desire to be integrated into police structures.⁸⁵ Instead, the police forces of the various homelands and independent territories needed to be amalgamated and rationalized in an organizational restructuring akin to the process that occurred with the public service generally. The newly appointed ANC minister with political responsibility for the police reassured the existing members of the police service that no radical changes would be forthcoming and that jobs were secure.⁸⁶ In this process, the integration of the former homelands police forces improved the demographic representation of the national police. As Cawthra notes, “[b]y the end of 1999, about 70 per cent of the approximately 125,000-strong force was black, although less than 30 per cent were female. However, half of the middle managers in the service were white and white men constituted 70 per cent of senior management.”⁸⁷ As with the intelligence and the army, a few high-profile personnel changes did occur as the result of judicial and other pressures. At least to some extent, these pressures derived from human-rights related grounds. In August 1992, the retirement of about a third of the existing white generals in the South African Police (SAP) was announced. Still, “none of the most senior ranking officers in the SAP who have been implicated in unlawful activities were among those scheduled to retire.”⁸⁸ In March 1994, de Klerk ordered immediate leave from duties for ten South African Police senior officers in response to an interim report issued by the Goldstone Commission.⁸⁹

CONCLUSION

One point raised by the South African inexperience with vetting in transition is that the relationship between the practice of vetting and the concept of administrative justice is not a relationship that can be prefigured. One cannot determine — without regard to the particular context of a society in transition and the implementation of particular programs — whether the fundamental rights of administrative justice (including procedural justice) are competitive with or complementary to the pursuit of transitional justice through practices such as vetting (which is also a form of administrative justice). In South Africa, this can be seen, for instance, in the operation of the TRC and its relationship to due process. Some will take the position that procedural obstacles (and

potential obstacles) presented by the right of administrative justice impeded the operation of the TRC and reinforced, without regard for transformation, the choice made in the transition against a general practice of vetting.⁹⁰ Others will take the position of the Constitutional Court that procedural justice and substantive justice are inextricably intermingled.⁹¹ In the end, the relationship will be a contested one.

It is hardly surprising that there are significant contests over the meaning and operation of concepts such as administrative justice within a time of transition. But the point does push us to move beyond it and to recognize at least one significant aspect (among others) of this contest. In an important sense—and a sense that is perhaps not recognized enough by those domestic and international advocates engaged in transitional politics—the contest over due process and administrative justice rights has a particularly *institutional* dimension. The contest—whether it occurs in the decisions of judicial bodies or the drafting of memoranda of understanding—cannot be separated from issues of the effective functioning of the public service or, for instance, the proper relationship between the judiciary and the executive.⁹² As other chapters in this collection demonstrate, attention to the institutional dimension is often overlooked but is significant.

Several institutional dimensions of vetting are demonstrated by the examination of the South African experience. First, what emerges as significant from the South African experience is the relationship of vetting with the content of the legal system. The law (even in the relatively narrow sense of the preexisting and dominant doctrine of the legal system) is a significant institution that must be taken into account when designing and operating a system of vetting. If the relationship of vetting with the legal system is not taken into account, then the stated goals of the vetting process are likely to be deflected and less likely to be achieved. Second, at least in the case of a transition relatively uninfluenced by international actors—such as South Africa's transition—public service institutions and structures must also be taken into account in designing or implementing a process of vetting. These institutions were powerful reinforcing factors with respect to the choice made in South Africa against vetting. A third point—perhaps relevant again mostly to domestic-driven transitions such as South Africa's—builds upon this observation. As detailed above, the significant political actors—including the liberation movements—at the outset of the South African period of transition made a choice against vetting. Their understanding of this choice was that individuals in existing organizations such as the public service or

the judiciary would not be dismissed. This understanding existed simultaneously with an understanding regarding the need to change the structure of the bureaucracies that made up, for example, the public service.⁹³ Although the precise nature of those structural changes was not specified nor agreed upon, it was common cause that these structures would change. What perhaps was not taken into account or appreciated sufficiently by all the actors were the institutional consequences of the choice against vetting. The choice against vetting meant that agreed-upon structural reforms of organizations such as the public service were that much more difficult to effect.

As a last word, one cannot avoid reflecting upon the relationship between race and the transformation of the state in the South African context. The South African experience provides one example of the degree to which the process of vetting in a time of transition may compete with (or mask or overlap) other themes of transformation such as racial justice.⁹⁴ Given the prominent role of the public service in the political economy of South Africa⁹⁵ and the demographic distribution of South Africa,⁹⁶ it was perhaps not surprising that advocates of racial transformation would focus on the public service in the period of transition. The push for change of the personnel of the public service on the grounds of race (and to a lesser extent gender) has thus competed with the efforts of advocates of vetting, at least those who based their argument for vetting narrowly on human rights considerations.

NOTES

- 1 A definitional issue is raised by the practice of security clearances. Indeed, this is the common-sense understanding of the term “vetting” in South Africa. Security clearance procedures were used in South Africa before, during, and after the transition. Perhaps inherently politicized, security clearance procedures can easily become even more so in a transition. Here, security clearances are distinguished from vetting and from personnel selection procedures.
- 2 Constitution of the Republic of South Africa, Act 108 of 1996 (1996 constitution).
- 3 There are numerous accounts of the events leading up to 1990. For a good overview, see William Beinart, *Twentieth-Century South Africa* (Oxford: Oxford University Press, 2001). For accounts of the transition, see Alistair Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (Wynburg: Struik Books, 1994).
- 4 Heinz Klug, “Historical Background,” in *Constitutional Law of South Africa*, ed. Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Derek Spitz, and Stuart Woolman (Cape Town: Juta, 1998), 2-1 to 2-19, here at 2-12. The interim constitution was adopted in December 1993 and the majority of its provisions came into effect on April 27, 1994. After the National Party government rejected the ANC's demand for an interim government, the parties agreed to establish a transitional executive council to provide some degree of access to the governing process for the ANC. The structures of the interim constitution were thus preceded by those of the Transitional Executive Council Act 151 of 1993.
- 5 Much less dramatic was the amalgamation of the eleven public services as detailed below.
- 6 See, for instance, Charles Villa-Vicencio and Wilhelm Verwoerd, eds., *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press; London: Zed Books, 2000); Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid, and Truth* (Cape Town: Redworks, 2001); Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002); Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).
- 7 See Richard Spitz and Matthew Chaskalson, *The Politics of Transition* (Oxford: Hart Publishing, 2000), 16. According to the minute, “the way is now open to proceed towards negotiations on a new constitution. Exploratory talks in this regard will be held before the next meeting which will be held soon.”
- 8 See Graeme Simpson and Paul van Zyl, “South Africa's Truth and Reconciliation Commission,” *Temps Modernes* 585 (1995): 394–407.

- 9 As part of its operation, the TRC conducted several different sectoral hearings, including one for the legal sector. Although the TRC attempted to facilitate such appearances, members of the judiciary refused to come in person before the TRC. Instead, the judiciary submitted only written representations. See Jonathan Klaaren, "The Truth and Reconciliation Commission, the South African Judiciary, and Constitutionalism," *African Studies* 57 (1998): 197–208 (exploring some aspects of the tension between the judiciary and the TRC).
- 10 What the TRC refers to in this quotation as lustration—disqualification for civil service on the grounds of responsibility for human rights violations—appears to fall within the project's and this paper's definition of vetting.
- 11 "The Skweyiya Commission of Enquiry into complaints by former African National Congress prisoners and detainees, August 1992." Footnote in the original. The Skweyiya Commission was an internal investigation commissioned by the ANC and led by a senior advocate.
- 12 Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: TRC, 1998), vol. 5, chap. 8: "Recommendations," 310–11, paras. 17–19.
- 13 It is beyond the scope of this chapter to outline what the position of international law is on this question. Also, it is not absolutely clear exactly what the TRC meant by "lustration" and whether that meaning is the same as "vetting." The TRC seems to have used the term "lustration" in a manner that emphasizes a categorical rule of disqualification rather than in a manner that includes the possibilities for institutional processes or practices of vetting. In this sense, the TRC may have been too quick to dismiss the potential of vetting for bolstering the transition.
- 14 Peter Bouckaert, "The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy," *Stanford Journal of International Law* 33 (1997): 275–411, here at 380.
- 15 The Office of the Attorney General was perceived to lack independence and legitimacy due to a number of shortcomings. *Annual Survey of South Africa Law* (1992), 775–77. The founding of the Independent Complaints Directorate might be seen similarly within the policing sector although the motivation for its establishment in 1998 was more clearly one of innovation than of renewal.
- 16 This section reports some primary research conducted on the civil service (including the security service). In this research, a modified version of the International Center for Transitional Justice (ICTJ) questionnaire with a covering letter and an abstract of the overall study were sent to all national government departments. The total number of these departments was thirty-seven. Seventeen departments responded, just under half the number contacted. A number of the departments referred the matter to the Department of Public Service and Administration (DPSA). A number of other departments referred the matter to the National Intelligence Agency (NIA).

- 17 Acting director general, Department of Public Service and Administration, letter to author, July 12, 2004 (on file with author).
- 18 According to the director generals of the Departments of Environmental Affairs and Tourism and of Minerals and Energy, no vetting took place in those departments.
- 19 Explaining why no vetting took place, a senior human resources official of the DPSA pointed to the fact that the South African public service instead underwent rationalization. Telephone interview, April 2004.
- 20 Annual Report of the Public Service Commission 1994, 6–7.
- 21 Annual Report of the Public Service Commission 1995, 6. For instance, section 237(1)(b) provided that responsibility for “internal rationalization” of administrations primarily rested with the relevant provincial government with due regard to advice of the Public Service Commission and relevant provincial commissions.
- 22 Annual Report of the Public Service Commission 1996, 14–15.
- 23 According to the categories used by the Commission, as of November 30, 1996, the public service was reported to consist of 775,956 Africans (65%), 39,845 Asians (3%), 110,221 Coloured persons (9%), and 269,816 Whites (23%). Annual Report of the Public Service Commission 1996, 18. As a very rough measure of comparison, as of September 30, 1990, the predecessor of the Public Service Commission (which reported on only one of the prior public services) claimed to have oversight of 748,302 persons, distributed in race categories as follows: 294,432 Africans (39%), 31,307 Asians (4%), 119,680 Coloureds (16%), and 302,883 Whites (40%). Commission for Administration 1990 Annual Report, Chapter E, 4.
- 24 Annual Report of the Public Service Commission 1995, 6.
- 25 Annual Report of the Public Service Commission 1996, “Foreword.”
- 26 Interview with F. Pelser, DPSA, January 31, 2005. Criteria for this policy included thirty years of service to the state, fifty years of age, and rank at least of assistant director of department level. This policy should be distinguished from the later one operative between mid-1996 and 1999—the voluntary severance package initiative—under which greater numbers of skilled persons left the public service. In 1994, 39 persons were discharged “to the advantage of the state” and 10 on grounds of ill health, with 57 persons discharged in total. In 1995, 120 persons were retired “to the advantage of the state,” 24 on the grounds of ill health, and 16 on the basis of rationalization, with 163 discharged in total. In 1996, 4 were discharged on the basis of rationalization and 1 on grounds of the interest of the public service. These figures are taken from the 1994–96 annual reports of the Public Service Commission.
- 27 The Public Service Commission is a body dating back to 1912. It was called the Commission for Administration from 1980 to 1994 and was renamed the Public Service Commission in 1994.

- 28 Presidential Review Commission, *Developing a Culture of Good Governance: Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa* (1998), 124 (citing the Central Statistics Service mid-1995 estimate).
- 29 Ibid., 123–27.
- 30 This section does not directly examine the extent to which permanent state structures of elected officials (such as parliament) used vetting processes with respect to elected officials. Essentially, this was left to the political process.
- 31 A research assistant phoned each national political party in existence during the transition and still in existence in 2004. These parties were the African National Congress (ANC), the New National Party (NNP), the Democratic Alliance (DA), the Pan-Africanist Congress (PAC), and the Inkatha Freedom Party (IFP). These phone interviews were conducted with public relations persons for each of the parties. Letters similar to those written to the national departments were then written to the political parties, addressed to the persons identified through the phone interviews. Some of the parties responded to the questions regarding vetting. The information in the responses is the information used in this section. In addition, a survey of newspaper documentation at the Centre for Applied Legal Studies (CALS) was conducted with respect to membership questions regarding political parties during the transition.
- 32 James Selfe, MP, Chairperson Federal Council, Democratic Alliance, letter to author, May 31, 2004 (on file with author).
- 33 “Accused ANC camps abuser made MK commissar,” *Weekly Mail and Guardian*, August 13, 1993.
- 34 “Getting to the truth of ANC Commissions,” *Weekly Mail and Guardian*, September 3, 1993. This position was publicly supported by Nelson Mandela. “Mandela’s Group Won’t Punish Its Rights Abusers,” *New York Times*, August 31, 1993. This political position was not limited to the ANC. Indeed, it was a feature of the constitutional compromise negotiated by these very same parties that the TRC would function as an alternative to criminal prosecution; Posel and Simpson, *Commissioning the Past*, 2–3. Given the constitutional status of the TRC, it was an attractive party strategy to deflect the issue of vetting to the TRC process.
- 35 Amnesty International (AI), “South Africa: Amnesty International Responds to ANC Report on Human Rights Abuses,” AI Index: AFR 53/WU 02/93 (August 24, 1993).
- 36 Those who drafted the interim constitution could have provided competence to parliament to enact vetting legislation. And of course, one can see the constitutional scheme as merely the result of political choices made during the drafting of the constitution. In any case, a significant feature of the interim constitution (as well as the final one) is the degree of continuity between these legal orders and their predecessors. Institutions such as the Public Service Commission were legally ratified under the interim

constitution. Although that degree of continuity is itself of course also a political choice, there is nonetheless some autonomy that the legal order has from that of politics or society. The competence or lack thereof to enact legislation on vetting fell within that measure of autonomy.

- 37 It is also not clear whether parliament would have been competent to enact such legislation from April 27, 1994, under the interim constitution, particularly in a phase of amalgamation of fragmented public services and their legal frameworks. Constitution of the Republic of South Africa, Act 200 of 1993 (interim constitution).
- 38 *AZAPO & Others v President of the Republic of South Africa* 1996 (4) SA 671 (CC), para. 59.
- 39 For a discussion of the case and its continuing relevance see John Duggard, "Is the truth and reconciliation process compatible with international law? An unanswered question," *South African Journal of Human Rights* 13 (1997): 258–68; Jonathan Klaaren and Howard Varney, "A second bite at the amnesty cherry? Constitutional and policy issues around legislation for a second amnesty," *South African Law Journal* 117 (2000): 572–93.
- 40 Interestingly enough, the legal effect of the postscript has not, by and large, been continued in terms of the 1996 constitution. See Klaaren and Varnet, "A second bite at the amnesty cherry?"
- 41 Acting director general of DPSA to author, July 12, 2004.
- 42 Sections 209 and 213, interim constitution.
- 43 In terms of section 209(2) of the interim constitution, the Public Service Commission was to operate according to the laws in force prior to the interim constitution. From the publication of the White Paper on the Transformation of the Public Service in November 1995, ideas about the transformation of the public service began to take hold within the culture of the public service. Pelser interview.
- 44 See Paseka Ncholo, "Reforming the Public Service in South Africa: A Policy Framework," *Public Administration & Development* 20 (2000): 87–92, here at 89 ("In what can be regarded as a watershed year for public administration in South Africa... executive functions were transferred from the Public Service Commission to the Minister of Public Service and Administration in 1996").
- 45 Posel and Simpson, *Commissioning the Past*, 6.
- 46 1997 (3) SA 204 (A). This order delivered by a court just below the Constitutional Court in the South African judicial hierarchy ratified an earlier court decision to force the TRC in this case to provide notice to an alleged perpetrator of the commission's intention to hear evidence that might harm the reputation of that alleged perpetrator of human rights abuses.
- 47 1989 (4) SA 731 (A).
- 48 1991 (1) SA 21 (A).

- 49 Tom Karis, March 2004, unpublished manuscript, City University of New York.
- 50 Klug, "Historical Background."
- 51 *Annual Survey of South African Law* (1991), 665–66.
- 52 Some background to the controversies regarding the legal profession in general and the judiciary in particular is provided in David Dyzenhaus, *Truth, Reconciliation and the Apartheid Legal Order* (Cape Town: Juta, 1998).
- 53 Nicholas Haysom, "Constitutional Court for South Africa," *CALS Occasional Paper* 14 (November 1991).
- 54 The Judicial Service Commission was initially established in terms of section 105 of the interim constitution and subsequently authorized in terms of section 178 of the 1996 constitution.
- 55 *Annual Survey of South Africa Law* (1993), 793. For transcripts of the interviews, see <http://www.concourt.gov.za/interviews/index.html>.
- 56 Penuel Maduna, "Address at the Banquet of the Judicial Officers, Symposium," *South African Law Journal* 120 (2003): 663–669, here at 665.
- 57 Of course a concept of judicial competence (in the sense of judicial skill or knowledge) has no definite meaning and perhaps even more so during a time of transition. For instance, one contested matter was the degree to which judges had experience or knowledge of constitutional law. This quality served at least in part in the judicial context as a proxy for adherence to the values and ideals of the new constitutional democracy.
- 58 Hugh Corder, "Judicial Authority in a Changing South Africa," *Legal Studies* 24 (2004): 253–274, here at 263; M. T. K. Moerane, "The Meaning of Transformation of the Judiciary in the New South African context," *South African Law Journal* 120 (2003): 708–718, here at 709.
- 59 Indeed, the organizations did not fit neatly into two sets and had multiple conflicting interests and histories. For instance, the intelligence agencies of the two liberation movements were clearly distinct.
- 60 Robert D'A Henderson, "South African Intelligence Under de Klerk," in *About Turn*, ed. Jakkie Cilliers and Markus Reichardt (Pretoria: Institute for Security Studies, 1995), 158–63. The Goldstone Commission is the commonly used term for the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, which was chaired by Justice Richard Goldstone. The five-person commission was appointed by the government on October 24, 1991, in terms of the Prevention of Public Violence and Intimidation Act of 1991. Its reports were not binding, although they could be persuasive. Largely enjoying support from the major political parties and movements in terms of the National Peace Accord, the Goldstone Commission was essentially investigating political violence in South Africa during its period of operation and was a precursor

to the TRC. It established several investigating units using police personnel, but these units functioned more as the eyes and ears of the commission rather than as investigators working towards prosecutions. For an overview of the political violence and the role of the Goldstone Commission, see Human Rights Watch, "Half-Hearted Reform: The Official Response to the Rising Tide of Violence," May 8, 1993. For a view of the TRC from the perspective of the Goldstone Commission, see Gareth Newham, "Truth and Reconciliation: Realising the Ideals," *Indicator SA* 12 (1995): 7–12.

61 Jeremy Sarkin, "Conscription," *South African Human Rights Yearbook* 4 (1993): 37–57, here at 40.

62 Kevin O'Brien, "South Africa's New Intelligence Environment," in *About Turn*, ed. Cilliers and Reichardt, 172–191, here at 174.

63 Ibid., 178.

64 Insertion by the author.

65 H. A. Dennis, Director General SASS, letter to author, March 18, 2004 (on file with author).

66 Apparently, SASS here is continuing to refer to vetting in the sense of security clearances only and not screening for human rights abuses. The security sector here includes the intelligence services as well as the intelligence agencies of the defense department and the police.

67 At the time of the intelligence service amalgamation, the security clearance screening done was governed by the same set of guidelines as existed before 1994. It was not until 1996 that the security clearance procedures were themselves changed in line with the constitution. Jonathan Klaaren, "National Information Insecurity? Constitutional Issues Regarding Protection and Disclosure of Information by Public Officials," *South African Law Journal* 119 (2002): 721–32.

68 Section 3(1) of the Intelligence Services Act allowed those who were part of the old organization to not join the new one. According to one commentator "many took this option, either resigning or being asked to leave." O'Brien, 186.

69 Paul Todd and Jonathan Bloch, *Global Intelligence: The World's Secret Services Today* (London: Zed Books, 2003), 191.

70 O'Brien, 174.

71 See, for instance, Advocate K. D. McKenzie, Executive Director, Independent Complaints Directorate, letter to author, April 19, 2004 (stating vetting criteria to be inclusive of susceptibility to blackmail or extortion, amenability to bribes, susceptibility to being compromised due to compromising behavior, and vulnerability to subversive activities and loyalty to the state or institution; on file with author). For some description of current South African vetting practices, see O. V. Moalafi, "Qualified to conduct the security vetting process," *SA Soldier* 10, no. 8 (August 2003): 16.

- 72 See P.L. Tlaka, letter to author (citing, inter alia, SABS ISO/IEC 17799 Code of Practice for Information Security Management), March 17, 2004 (on file with author).
- 73 Prior to 1994, security clearance procedures were implemented by the National Intelligence Services (in addition to those implemented by the police and the defense department). After the creation of the separate organizations of NIA and SASS (see above), each of those two organizations conducted their own security clearance procedures.
- 74 In particular, members of the Pan Africanist Security Service (PASS) did join the amalgamation process. NIA Public Annual Report 2001/2002, 8.
- 75 Ibid.
- 76 "Spies' names kept from Mandela," *Saturday Star*, January 24, 2004.
- 77 D'A Henderson, "South African Intelligence," 141.
- 78 For further research, see E. Taole, "Management Practice in Military Integration of the National Defence Force between 27 April 1994–27 April 1996" (masters thesis, University of the Witwatersrand, 1997); Tsepi Motumi, "Defence Demobilisation and Rationalisation in South Africa" (masters thesis, University of the Witwatersrand, 2000); and Tsepi Motumi and Andrew Hudson, "Rightsizing: The Challenges of Demobilisation and Social Reintegration in South Africa," in *Dismissed: Demobilisation and Reintegration of Former Combatants in Africa*, ed. Jakkie Cilliers, (Pretoria: Institute for Security Studies, 1995), 112–29.
- 79 Gavin Cawthra, "Security Transformation in Post-Apartheid South Africa," in *Governing Insecurity*, ed. Gavin Cawthra and Robin Luckham (London: Zed Books, 2003), 38.
- 80 Ibid., 42.
- 81 Ibid., 41.
- 82 T.T. Matanzima, "Human Resources Challenges," in *Continuity in Change: The SA Army in Transition*, ed. Jakkie Cilliers (Pretoria: Institute for Security Studies, 1998), 55–72, esp. 58–59.
- 83 Thus, for instance, the JMCC commissioned a report into the operation and objectivity of the clearance process in 1994. In 1995, after integration, the security clearance unit collectively revisited their evaluation process and decided not to change the criteria but nonetheless to apply them more strictly.
- 84 Interview with Brigadier General Moalifi and staff, Pretoria, South Africa, February 7, 2005.
- 85 Cawthra, "Security Transformation," 43–44. For an overview of the police in transition, see Janine Rauch, "Police Reform and South Africa's Transition," paper delivered at South African Institute for International Affairs, Johannesburg, 2000. Rauch points out that some members of the liberation movements were absorbed into the police, including "approximately 200 bodyguards [who] were integrated into the VIP Protection Service," "a number of ANC intelligence personnel [who] were posted to

the Crime Intelligence Department of the SAPS—the reformed Security Branch,” “a small number of young people” who had been members of the ANC’s “self-defence units” (SDUs) and the IFP’s “self-protection units” (SPUs) were integrated into a “community constable group,” and “a small number of civilians [who] were recruited into middle and senior posts in the SAPS” during the competitive “senior appointments process.”

- 86 The minister “embarked on a nationwide series of mass meetings with police personnel, to reassure them about the ANC’s intentions to reform the police gradually, rather than radically; and to spread the message that, although the ANC would not tolerate abuses of human rights, it would not victimise perpetrators of such abuses committed in the past, if the perpetrators abided by new government doctrine. This series of meetings was also critical in giving a human face to the new ANC government, and identifying the ANC as the stable political authority during the insecure period of amalgamation of the police forces.” Rauch, “Police Reform.”
- 87 Cawthra, “Security Transformation,” 44.
- 88 Human Rights Watch, “Half-Hearted Reform: The Official Response to the Rising Tide of Violence,” May 8, 1993.
- 89 *The Citizen*, March 19, 1994.
- 90 Jeremy Sarkin, “The Trials and Tribulations of South Africa’s Truth and Reconciliation Commission,” *South African Journal on Human Rights* 12 (1996): 617–640, here at 617.
- 91 *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC), para. 44 (“A harmonious balance needs to be found between the urgent need to eradicate unfair discrimination on the one hand, and the obligation to act fairly, on the other. There is no doubt that, in the process of transition upon which we have embarked, we need to remain committed to the goal of equality, but that goal must be pursued in a manner consistent with the other constitutional requirements, including procedural fairness”).
- 92 Although I would include the independent role of the law in this institutional aspect, the term is chosen here to direct attention of policymakers and other persons involved in the design and operation of transition to the organizational and bureaucratic dimensions of questions around vetting.
- 93 Ncholo, “Reforming the Public Service in South Africa,” 87 (noting that the pressure for change in the public service came from the new government in order to “replace the rule-bound, command-and-control approach of the apartheid regime with one that aimed to reorient public servants to ‘serve the public’ in a customer-focused way”).
- 94 Although racial justice and vetting practices are by no means necessarily incompatible, for purposes of analyzing and presenting the South African experience with vetting, this chapter has defined the grounds of transition associated with vetting not to include racial justice.

- 95 According to World Bank figures, South Africa is “amongst the world’s biggest spenders on public service salaries.” Robert Cameron and Chris Tapscott, “The Challenges of State Transformation in South Africa,” *Public Administration & Development* 20 (2000): 81–86, here at 85.
- 96 See note 28.

CHAPTER 5

Vetting to Prevent Future Abuses:
Reforming the Police, Courts,
and Prosecutor's Offices
in Bosnia and Herzegovina

Alexander Mayer-Rieckh

INTRODUCTION

The 1995 Dayton Peace Agreement not only ended a brutal three-and-a-half-year war but also designed a complex program to build the peace in Bosnia and Herzegovina. The former warring factions (the country's Bosniaks,¹ Serbs, and Croats) signed the agreement only under tremendous international pressure. Although these factions carried primary responsibility to fulfill the agreement, they consistently—albeit to different degrees—resisted its implementation in the post-Dayton period. In response, international actors on the ground abandoned their initially cautious approach in view of continuous obstruction by the parties and increasingly intervened directly to move forward the implementation of the peace process.

This contentious environment affected efforts to reform the rule of law sector including the vetting of its personnel (by vetting I mean assessing integrity to determine suitability for public employment). In the early post-Dayton period, the police did not enforce the law impartially and the courts did not fairly render justice. Public confidence in the rule of law remained low. Domestic authorities, however, failed to reform the police, the courts, and the prosecutors' offices, and did not remove police officers, judges, or prosecutors who were unfit for service. As a result, international actors gradually adopted a more proactive approach to reforming and building the rule of law sector. Between 1999 and 2002, the United Nations Mission in Bosnia and Herzegovina (UNMIBH) screened close to twenty-four thousand law enforcement personnel.² The High Judicial and Prosecutorial Councils (HJPC), bodies with mixed international and national staff, reappointed judges and prosecutors for close to one thousand—almost all—judicial and prosecutorial positions between 2002 and 2004.

The UNMIBH certification process and the HJPC reappointment process represent two distinct approaches to vetting. The certification process was a review process. Serving law enforcement personnel were screened and

removed only if they did not meet the criteria for certification. In the reappointment process, on the other hand, the courts and prosecutors' offices were reconstituted and there was a general competition for all posts. Serving judges and prosecutors also had to reapply for their own positions. Although the goal of the certification process was to remove those individuals who were found unfit for service, the aim of the reappointment process was to select for office the most qualified candidates. This chapter describes some of the opportunities and risks associated with these two distinct approaches to vetting.

Both the UNMIBH certification process and the HJPC reappointment process reveal an institutional dimension of vetting. The principal rationale for both processes was comprehensive personnel reform to build fair and effective institutions rather than establishing individual accountability for past abuses. This study also shows that efforts to build public institutions that prevent the recurrence of abuses should generally not be limited to excluding abusers, but require a comprehensive reform of the institution, including a full review of its personnel. Effective personnel reform will identify the various shortcomings of the institution's employees and ensure the selection of competent and representative personnel of integrity.

The chapter is divided into five sections. The first section provides a short account of the conflict in Bosnia and Herzegovina and an overview of the Dayton Peace Agreement. The second describes UN efforts to screen and certify the police, and the third examines the reappointment of judges and prosecutors, which was carried out by the HJPC. The fourth section places these vetting processes in the context of other transitional justice measures. The last section discusses four salient issues relevant to a better understanding of the concept and praxis of vetting in general: the relationship between vetting and institutional reform; review and reappointment as two distinct approaches to vetting; the role of international organizations in vetting processes; and the issue of resources.

BACKGROUND AND CONTEXT

THE POLICE AND COURTS IN YUGOSLAVIA AND THE CONFLICT

In communist Yugoslavia, each of the six republics had its own law enforcement and judicial systems. The police force formed an integral part of a republic's Ministry of Interior. The ministry was headed by a minister who was a

member of the communist *nomenklatura* and managed all operational and personnel aspects of the police. Each republic had a three-tier court system and its own constitutional court. Judges were appointed by the republic's parliament on the recommendation of the communist minister of justice. Membership in the Communist Party was a condition for professional advancement of judges, prosecutors, and police officers. De facto, communist Yugoslavia did not have a genuine separation of powers. The government was dominated by the communist state apparatus, and the judiciary was under the control of the executive branch of government. When nationalist parties came to power in Yugoslavia following the breakdown of communism and the 1990 elections, they took control of the state apparatus, including the police and the judiciary.

Following Bosnia and Herzegovina's declaration of independence from Yugoslavia in February 1992, conflict quickly erupted among the country's Bosniaks, Serbs, and Croats, and the country plunged into all-out war.³ Both Bosnian Serbs and Bosnian Croats were actively supported by regular Serbian and Croatian forces, that is, the Yugoslav National Army (JNA) and the Croatian Defense Force (HVO), and sought to split off large parts of the territory of Bosnia and Herzegovina. Bosnian government (Bosniak) forces fought to preserve a unitary state that would maintain the borders of the Republic of Bosnia and Herzegovina in the former Yugoslavia. Assault on civilian populations, in particular the forced migration of populations on the basis of their ethnicity (what became infamously known as "ethnic cleansing"), was not only an instrument of warfare but above all a central aspect of the political project the war was intended to accomplish. In particular Bosnian Serb and Bosnian Croat forces dispossessed, displaced, interned, ill-treated, raped, and killed populations to enlarge the territory they controlled. During the atrocious three-and-a-half-year armed conflict, an estimated one quarter of a million people were killed and 2.2 million people (more than half the population) were displaced.⁴

After the outbreak of the conflict, Bosnian Serb and Bosnian Croat leaders seized the public institutions in their "autonomous areas," including the police and the judiciary.⁵ The police now served nationalist enclaves and turned into an instrument of war, executing the policy of "ethnic cleansing." The transition from law enforcement to war fighting was all the easier because the police in communist Yugoslavia had a paramilitary role in the national defense system, in addition to its regular law enforcement and state security role. In times of war, the police were to support the territorial defense in the

interior of the country. During the conflict, the military and police conducted joint operations, and soldiers and members of paramilitary groups without formal police training joined the police.

International, in particular European, efforts to resolve the conflict in Bosnia and Herzegovina were intense, though indecisive, haphazard, and ineffective. As a result, self-declared nationalist leaders and warlords in the country dictated events and exacerbated the conflict. This only changed decisively in 1995 due to more active involvement by the United States, international public outrage following the fall of the UN-designated safe areas of Srebrenica and Zepa in July 1995, and the international community's new resolve to use force.⁶ Following the agreement of the Bosnian Croats and Bosniaks to ally themselves in the Federation of Bosnia and Herzegovina (the Washington Agreement),⁷ Croat and Bosniak forces launched successful offenses against the Serbian forces, which at last set the necessary conditions for a settlement.

THE DAYTON PEACE AGREEMENT

The General Framework Agreement for Peace in Bosnia and Herzegovina, the so-called Dayton Peace Agreement, was negotiated in November 1995 under strong U.S. pressure in Dayton, Ohio, and signed in Paris on December 14, 1995.⁸ The agreement had essentially two objectives: to end the fighting and to build a viable, democratic state of Bosnia and Herzegovina. Although the parties carried primary responsibility to implement the agreement, it designated a broad array of international organizations to assist the process. The Stabilization Force in Bosnia and Herzegovina (SFOR), a multinational force led by NATO, was to oversee the compliance with the military provisions. The peace agreement designated a high representative to oversee and coordinate the implementation of its civilian aspects. The high representative was nominated by and received political guidance from the Peace Implementation Council, which was established to mobilize international support for the peace process.⁹ The specific tasks related to civilian implementation were divided up between different international organizations, in particular the Office of the High Representative (OHR) itself, the Organization for Security and Cooperation in Europe (OSCE), the UN Mission in Bosnia and Herzegovina (UNMIBH), and the UN High Commissioner for Refugees (UNHCR).

The Dayton Peace Agreement was a "coerced compromise" rather than a sincere agreement, and yet it relied primarily on those responsible for the

war to implement the peace.¹⁰ Nationalist Bosnian Serbs and Bosnian Croats fiercely resisted the implementation of the agreement, as its objectives were contrary to the very reasons why they began the war, and implementing the agreement would have reversed the war's outcomes. Significantly, they were not committed to the two fundamental provisions of the peace agreement: the territorial integrity of Bosnia and Herzegovina in its pre-conflict borders and the right to return of all displaced persons. Although Dayton ended the fighting, the conflict continued by other means. This left a heavy responsibility on the international implementers, who were ill equipped to fulfill it.

The Constitution of the Dayton Peace Agreement provided for weak state structures.¹¹ Bosnia and Herzegovina would consist of two coequal "entities," the Federation of Bosnia and Herzegovina (the Federation) and the Republika Srpska (RS), and all governmental functions except the few expressly assigned to the state would fall under the responsibilities of the entities. In the Federation, authority was further devolved to the ten cantons in order to create a delicate balance of power between Bosniaks and Bosnian Croats.¹² Regular law enforcement, judicial, and prosecutorial functions fell under the mandate of the two entities.¹³ In the Federation, the ten cantons had primary responsibility for police and the judiciary.¹⁴ As a result, the post-Dayton law enforcement, judicial, and prosecutorial systems were highly fragmented and remained vulnerable to interference by local leaders with nationalist agendas.¹⁵

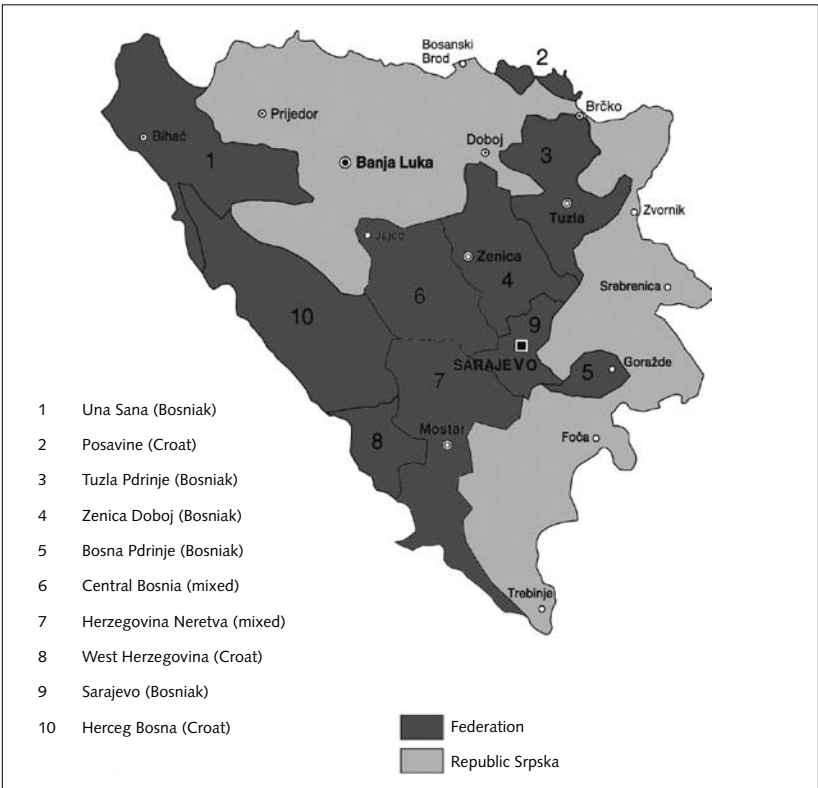
In terms of police reform, the parties committed themselves in the Dayton Peace Agreement to "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms,"¹⁶ and to ensure the "prosecution, dismissal or transfer, as appropriate" of police officers responsible for serious abuses of the basic rights of minorities.¹⁷

The Dayton Peace Agreement designated an International Police Task Force (IPTF) to assist in the reform of the police and entrusted the United Nations to run it.¹⁸ The Security Council established UNMIBH, which included the IPTF under the responsibility of a UN civilian office.¹⁹ Initially, the IPTF included 1,721 international police officers, a number later increased to 2,027.²⁰ UNMIBH did not have an executive mandate and had no enforcement powers vis-à-vis the parties. It was to monitor, advise, and train local police officers, and to assist and facilitate the reform process.²¹ Reforming the

police, including vetting its personnel, would require the consent and support of the domestic authorities.

Judicial reform did not feature prominently in the Dayton Peace Agreement. The new Constitution obliged the parties to “ensure the highest level of internationally recognized human rights and fundamental freedoms,” including “the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.”²² The peace agreement did not specify, however, what reforms were necessary to ensure the respect of these rights, and there was no specific reference to the need to reform the courts, the offices of the prosecutor, or the penitentiary system. Moreover, although several international organizations had a human rights mandate,²³ no international organization was specifically tasked with assisting and coordinating judicial reform.

BOSNIA AND HERZEGOVINA AFTER DAYTON



SOURCE: Office of the High Representative, Maps. See <http://www.ohr.int/ohr-info/maps>.

VETTING THE POLICE

THE PRE-VETTING SITUATION

By the end of the conflict, the number of active police officers in Bosnia and Herzegovina had reportedly swelled to an estimated 44,750, a threefold increase of their prewar size. Of these, 32,750 were in the Federation, including 3,000 deployed in Bosnian Croat-controlled areas. The RS reportedly had 12,000 police officers.²⁴ These figures exceeded by far generally accepted practice in Western European democracies.

Rather than upholding the rule of law and human rights, the post-Dayton police continued to support nationalist separatist agendas and to function in separate ethnically-based forces, each operating under the direct control of the respective ethnically-based political party. There was no police cooperation between the two entities, and the Bosnian Croat police operated autonomously within the Federation. Particularly in Bosnian Croat and Bosnian Serb areas, minority returnees were not protected during home visits, and minority-related incidents were not investigated. The police forces themselves had war criminals among their ranks and continued to discriminate against, harass, and intimidate minority populations. The absence of functional law enforcement created a climate of impunity, subverting a fundamental clause of the Dayton Peace Agreement: the promise that all refugees and displaced persons could voluntarily and safely return.

THE UNMIBH CERTIFICATION PROCESS

CONTEXT AND LEGAL BASIS

During the first years after Dayton, the parties undermined most serious efforts to reform the police. Although obstruction by those who carried principal responsibility for the conflict and its outcomes, in particular nationalist Bosnian Serb and Bosnian Croat groups, could be expected, the international community initially maintained the fiction that it should be there only to assist rather than ensure implementation.

In response to the domestic groups' obstruction, the overall approach of the international community changed over time and UNMIBH's mandate evolved gradually. Security Council Resolution 1088 of December 1996 gave UNMIBH the power to conduct independent investigations into abuses by the local police.²⁵ In 1997, the high representative was authorized to make binding decisions.²⁶ On several occasions, the high representative used these powers to remove police officers who had committed serious violations of duty. On the

basis of the April 1996 police restructuring agreement for the Federation (the Bosniak-Bosnian Croat entity) and of UN Security Council Resolution 1088, UNMIBH developed the power to decertify police officers who were found responsible for human rights abuses or other serious violations of duty.²⁷

Eventually, in December 1998, a police restructuring agreement was also signed for the other entity of Bosnia and Herzegovina, the RS.²⁸ The agreement authorized UNMIBH to vet the police.²⁹ On the basis of the Federation and RS restructuring agreements, UNMIBH issued five policies that determined the maximum strength and ethnic composition of the police services and established a three-step personnel reform process: registration, provisional authorization, and certification.³⁰

THE UNMIBH LOCAL POLICE REGISTRY SECTION

UNMIBH entrusted its Human Rights Office with implementing the certification process. The Human Rights Office established the Local Police Registry Section, which was comprised of a staff of two international civilian staff members (a project manager and an international lawyer), twenty-eight international police officers, and twenty national staff members (lawyers, translators, electronic data managers, and administrators). The section was supported by two liaison officers at the International Criminal Tribunal for the Former Yugoslavia in The Hague and by several lawyers and police investigators in other sections of the Human Rights Office. The three-step personnel reform process began in November 1999, and close to twenty-four thousand law enforcement personnel had to be vetted over the next three years.

REGISTRATION, PROVISIONAL AUTHORIZATION, AND CERTIFICATION

Registration. From November 1999 to December 2000, UNMIBH registered all Ministry of Interior personnel who presented themselves during the registration process. In total, 23,751 persons were registered. The registration form included comprehensive information on qualifications, current assignment, professional history, and background. The information was recorded in the UNMIBH local police registry.³¹ The registration process defined the pool of persons to be vetted and closed the doors to arbitrary manipulations of the police personnel lists by the ministries or the political leadership. A person who had not been registered would not be included in the personnel reform process. Once the registration process was completed, access to the police was limited to the regular recruitment procedures: a person wanting to become a police officer had to apply at the police academy.

Provisional authorization. Registered persons underwent an initial screening process to quickly remove those who clearly did not meet minimum criteria for service. These criteria included minimum age, citizenship, minimal training requirements, and a position requiring the exercise of police powers. Circumstances that precluded provisional authorization were, inter alia, a criminal record or indictment or previous removal by UNMIBH.³² Officers who met the criteria were provisionally authorized by UNMIBH to exercise police powers and were issued a UNMIBH identification card. Beyond these minimum criteria, provisional authorization did not indicate a comprehensive assessment of the suitability of the police officer.

Certification. Persons who were provisionally authorized were subject to more extensive background checks and performance monitoring by UNMIBH.³³ Those who passed the comprehensive checks received full certification from UNMIBH. The final decision rested with the UNMIBH police commissioner. Circumstances that excluded a police officer from certification included, in particular, independent evidence obtained by UNMIBH of a serious breach of law or duty; a material misrepresentation to UNMIBH that fundamentally affected consideration of suitability;³⁴ a violation of property legislation; and “acts and/or omissions, and/or functions from the period of April 1992 to December 1995, which demonstrate the inability or unwillingness to uphold internationally recognized human rights standards.”³⁵ The latter two categories merit closer attention in the context of this study on vetting.

During the conflict, minority populations were generally forced to give up their housing and property, which were subsequently occupied by members of the ethnic majority, in particular members of the armed forces, police, and the nationalist leadership. During the certification process, UNMIBH checked the property status of more than 8,300 police officers whose pre-conflict addresses were different from their current addresses. Illegal occupants had to regularize their housing situation or they would not be certified. Of the 7,998 illegal occupant police officers, around 80% vacated the property they occupied. The remaining 20% entered into rental agreements with the rightful owners. Three police officers were not certified because they failed to vacate the property they illegally occupied or to reach such an agreement with the rightful owner.

The formula “acts and/or omissions, and/or functions from the period of April 1992 to December 1995, which demonstrate the inability or unwillingness to uphold internationally recognized human rights standards” provided the basis for vetting the wartime background of police officers.³⁶ This

information was drawn from four principal sources: databases of the International Criminal Tribunal for the Former Yugoslavia, statements of victims and witnesses, information from nongovernmental organizations, and data in the registration forms completed by the police officers themselves.

UNMIBH reviewed the information and conducted independent follow-up investigations as required. Police officers were not given an opportunity to be heard or to defend themselves. On the basis of the case files prepared and the recommendations made by the UNMIBH Human Rights Office, the UNMIBH police commissioner decided whether to certify a police officer or not. An officer was not certified if there were grounds for suspicion that he or she had committed a war crime or crime against humanity listed in relevant domestic provisions and associated international standards. The “grounds for suspicion” standard of proof corresponded to an obligation of the domestic police to start a criminal investigation (or a prosecutor to initiate an inquiry) into the potential commission of a crime. A higher standard of proof did not appear to be feasible: “The standard UNMIBH applied was a balance between the urgent need to vet human rights violators from the Bosnian police and the need to implement a procedure that respected the rights of those under scrutiny.”³⁷

The types of cases reviewed included, *inter alia*, police officers who were guards or interrogators in concentration camps and took part in ill-treatment of prisoners; commanders of military police units that operated detention facilities where atrocities occurred; and officers who were directly involved in war crimes or crimes against humanity including murder, rape, torture, and ill-treatment during the conflict. The cases fell into three categories of responsibility: complicity, command responsibility, and direct commission.

A police officer who was not certified was no longer authorized to exercise police powers. He or she had to hand in his or her UNMIBH identification card and police-issued side arm, and the chief of police had to initiate measures to terminate the officer’s employment. If the individual continued to exercise police powers, he or she was considered to be illegally impersonating a police officer and was subject to arrest and disarmament by SFOR.³⁸ Non-certification precluded employment in any position within any law enforcement agency in Bosnia and Herzegovina.³⁹

A person who had been denied certification could request in writing a review of her or his case. The relevant policy stated that UNMIBH “will respond to requests in accordance with internal guidelines” but did not specify the steps of the review process.⁴⁰ In early 2002, an internal UNMIBH panel was established, the members of which were independent of the UNMIBH

police commissioner. The panel reviewed submissions and, if warranted, referred cases back to the commissioner for reconsideration of his decision.⁴¹ The final decision rested again with the UNMIBH commissioner.

OUTCOMES, PERCEPTIONS, AND CHALLENGES

OUTCOMES

UNMIBH's mandate came to a close in December 2002. In the course of the certification process, UNMIBH registered and screened all 23,751 Ministry of Interior personnel who presented themselves to the registration teams. Of these, 16,803 were granted provisional authorization to exercise police powers. The overwhelming majority of those not provisionally authorized were administrative support personnel who, a priori, did not qualify for authorization to exercise police powers. Of those provisionally authorized, 15,786 were granted full certification. Certification was denied to 481 officers, while 228 cases were pending in December 2002.⁴²

TABLE 1

Overall breakdown of certification figures

	REGISTERED	PROVISIONALLY AUTHORIZED	CERTIFIED	NOT CERTIFIED	PENDING
Federation of BiH	n/a	n/a	8,311	254	104
Republika Srpska	n/a	n/a	5,692	184	104
Brčko District	n/a	n/a	263	1	2
State Border Service	n/a	n/a	1,351	41	16
Fed. Court Police	n/a	n/a	169	1	2
<i>Total</i>	23,751	16,803	15,786	481	228

SOURCE: *Report of the Secretary-General, S/2002/1314* (December 2, 2002): 3

The UNMIBH certification process not only led to a verification of the suitability of individual police officers, but also to a reduction in the overall number of officers, an improved ethnic composition of the services, and an increase in female officers. Although the post-conflict police forces throughout Bosnia and Herzegovina were essentially mono-ethnic and without female officers, there was an average of around 10% minority officers and around 3% female officers in December 2002. The police forces in Bosnia and

Herzegovina had moved closer to meeting European policing standards, a requirement to negotiate a stabilization and association agreement with the European Union.

At the time of writing, it was not clear whether the UNMIBH certification process actually led to an overall improvement in the performance of the police. No comprehensive assessment of the impact of the UNMIBH reform and certification process had been carried out and there was no ongoing evaluation of the police performance in Bosnia and Herzegovina. However, the reform of the police appeared to have positively affected the performance of the police in certain minority return areas and possibly the return process itself. For example, the number of attacks and other violent incidents targeting minority returnees decreased significantly in Stolac near Mostar following the removal of police officers with bad human rights track records and the inclusion of minority officers in the Stolac police administration in 1999.⁴³

The situation of noncertified police officers had not been comprehensively assessed either. Senior Ministry of Interior officials and union representatives interviewed for this study mostly felt that those not certified had generally not been treated fairly in the course of the UNMIBH certification process. A handful of noncertified police officers were also interviewed during research for this study. They generally experienced a sense of powerlessness in the face of the UNMIBH certification process. They felt they were treated unfairly. In particular, they expressed extreme frustration at the fact that they had not been given an opportunity to be heard and defend themselves. As they had been police officers their entire life and had been excluded from any work in a Ministry of Interior in the future, it was almost impossible for them to find alternative employment.⁴⁴

PUBLIC PERCEPTIONS

According to a public opinion survey commissioned by the United Nations Development Program (UNDP), overall public confidence in the police rose slightly during the period the police officers were vetted and the police services were restructured with the assistance of UNMIBH.⁴⁵ Minority returnees generally expressed greater trust in the police following the integration of minority officers and the removal of human rights abusers.⁴⁶ The percentage of those believing that there is a significant level of corruption in the police remained, however, roughly the same.⁴⁷ A serious impact assessment would be necessary to ascertain the accuracy of such partial evidence and determine the effects of the vetting and restructuring processes.

CHALLENGES AND LIMITATIONS

Political resistance. UNMIBH encountered fierce resistance from domestic actors who not only failed to meet their obligations to vet the police but also strongly objected to the UNMIBH certification process and obstructed it whenever possible. Ministers and other government officials generally denied any wartime wrongdoing of police. A number of police officers who were denied certification continued to work, moved to other Ministries of Interior, were appointed as civilian advisors to ministers, or just remained on the ministry's payroll. The ministries also failed to initiate disciplinary or criminal proceedings against those police officers who were denied certification. The UNMIBH certification process reveals the tremendous complexity of a personnel reform process in a transitional situation without clear regime change.

Legal challenges. Procedurally, UNMIBH applied a questionable minimalist approach, which it justified by operational constraints. The UNMIBH certification process did not provide for the possibility of review by an independent and impartial "tribunal"⁴⁸ or a fair and oral hearing, which are generally required in administrative proceedings.⁴⁹ The UNMIBH review mechanism was not public, submissions had to be made in writing, the review panel was not independent, and it only had powers to make recommendations. The final decision rested with the UNMIBH police commissioner, who had already taken the decision in the first instance. Also, a "balance of probabilities" standard, rather than the "grounds of suspicion" standard used by UNMIBH, is generally accepted as the appropriate standard of proof in administrative proceedings.⁵⁰

The UNMIBH certification process was regulated in internal UNMIBH policies issued by the UNMIBH police commissioner and communicated to the ministers of interior. The domestic authorities did not amend domestic laws to ensure their consistency with the UNMIBH guidelines, and UNMIBH and OHR failed to pursue their incorporation into domestic laws. The uncertain status of the UNMIBH policies led to considerable confusion when a number of former police officers challenged their noncertification in domestic courts following the departure of UNMIBH.⁵¹

Handover and legacy. Leading up to the closure of UNMIBH in December 2002, there was significant pressure to complete the certification process, in accordance with the UNMIBH Mandate Implementation Plan.⁵² At the same time, the UN was already drawing down its personnel and resources. The European

Union Police Mission, which took over from UNMIBH on January 1, 2003, regarded its role as purely advisory and considered the certification process to be completed with the departure of UNMIBH.⁵³ The local police registry set up by UNMIBH was disbanded, sealed, and shipped away for storage in the UN archives near New York City.

Complaints by noncertified police officers and challenges before domestic courts and the Human Rights Chamber, an internationally-led human rights court in Sarajevo, continued and intensified after the departure of UNMIBH. Some noncertified officers alleged that they were never notified in person by UNMIBH about the decision denying them certification and, therefore, were denied any appeal against those decisions. Others stated that their appeal filed against the UNMIBH decision remained unanswered. Some submitted evidence that called into question the facts upon which the UNMIBH decisions were based. As of March 2004, more than one hundred fifty noncertified police officers had asked domestic courts to review the legality of their dismissals. Some courts were of the opinion that they had no jurisdiction over UNMIBH decisions that provided the basis for ministry dismissals. Other courts issued judgments declaring such dismissals unlawful and reinstating police officers that were not certified by UNMIBH.⁵⁴

Whatever the merits of the allegations made by noncertified police officers, the abrupt termination of UNMIBH, the failure to incorporate the certification regulations into domestic legislation, the removal of all files related to the certification process, and the failure to put in place a follow-up mechanism that could address challenges to the UNMIBH certification process undermined the credibility of the entire process and endangered its outcomes.⁵⁵ In a presidential statement of June 25, 2004, the UN Security Council called upon Bosnia and Herzegovina “to ensure, including through the adoption or amendment of domestic legislation, that all IPTF certification decisions are fully and effectively implemented and that the employment of persons who were denied certification by the IPTF be terminated, and that such persons will be precluded from employment, either now or in the future, in any position within any law enforcement agency in Bosnia and Herzegovina.”⁵⁶ This statement did not put to rest the controversies over the UNMIBH certification process and demands continued that a mechanism be established to review contested certification decisions.⁵⁷

VETTING JUDGES AND PROSECUTORS

THE PRE-VETTING SITUATION

The challenges to building an effective and fair judicial system after Dayton were daunting. The country was divided into several territorial jurisdictions, which were frequently run as if they belonged to different sovereign states; the legal system comprised a multitude of overlapping and inconsistent laws; the judicial infrastructure had been severely damaged; and a number of unqualified individuals had been appointed to judicial positions, while other qualified legal professionals had left the country or compromised themselves as a result of their involvement in the conflict.

The post-Dayton judicial system continued to serve conflict-era agendas.⁵⁸ Rendering justice in the courts all too often depended on an individual's national identity—or that of the judge or prosecutor before whom she or he appeared. Property rights were not protected, attacks on returnees not investigated, corrupt politicians not effectively prosecuted, and war criminals not indicted. As with the police, nationalist politicians and organized criminals continued to exercise undue influence on judges and prosecutors. Nationalist parties ensured the appointment of their own judges and prosecutors, and nationalist politicians blatantly interfered in judicial proceedings by giving instructions to judges, bribing them, or threatening them.⁵⁹

THE HIGH JUDICIAL AND PROSECUTORIAL COUNCILS

CONTEXT AND LEGAL BASIS

Although police reform was slow in coming during the first years after the Dayton Peace Agreement, judicial reform hardly took place at all. The parties to the agreement did not make any serious efforts to reform the courts and prosecutors' offices, and the vagueness in the agreement on the role and function of international intervention in the judicial sector led to piecemeal and competing international reform efforts with pitiful results. The international community stood by as the "misrule of law" continued for several years.⁶⁰

From 1998 onwards, rule of law reform began to feature more prominently on the international agenda.⁶¹ Initial efforts to comprehensively review serving judges and prosecutors and remove those unsuitable for service were, however, unsuccessful.⁶² In response, the Independent Judicial Commission (IJC), established in early 2001 as the lead international agency for judicial reform, developed a reinvigorated strategy for judicial reform, proposing to replace the ongoing review process with a reappointment of all judges and

prosecutors.⁶³ The IJC recognized that the number of courts, judges, and prosecutors in Bosnia and Herzegovina was far higher than general practice in Western European democracies. As a result, the judicial system was costly and inefficient. Moreover, ethnic representation in the judiciary did not reflect the ethnic composition of the population it was called to serve. The IJC, therefore, proposed to establish a reappointment process not only to ensure the suitability of judges and prosecutors, but also as a tool to restructure the court system, reducing its size and ensuring proportionate ethnic representation.⁶⁴ The reappointment process would involve an open competition for all judicial and prosecutorial posts and would be implemented by an independent high council to effectively obviate political interference.

A number of experts, in particular from the Council of Europe, initially expressed strong reservations about a general reappointment process. The principal concern related to the proposed open competition for judicial positions and the possible removal from office, six years after the signing of the Dayton Peace Agreement, of judges already enjoying life tenure, even though no individual misconduct had been established. Such measures would violate the independence of the judiciary, in particular the principle of irremovability, which is contained in the entity constitutions and in legislation imposed by the high representative himself, and would set a negative precedent of political interference in the judicial sector.⁶⁵

In response, other analysts stated it was “precisely because the judiciary ... [was] not independent that the professional review process was created in order to clear the ground for real independence to take root.”⁶⁶ Moreover, the reappointment process was not only necessary but also the most equitable process to implement the required restructuring of the court system, in particular the reduction of courts and judicial personnel, as well to improve ethnic representation.⁶⁷ The experts critical of the reappointment process later softened their opposition, in particular following the decision to create the Office of the Disciplinary Prosecutor to investigate complaints against judges and prosecutors, which would ensure the application of minimum due process standards for sitting judges and prosecutors.⁶⁸

MANDATE AND STRUCTURE OF THE COUNCILS

To alleviate some concerns of the decentralized local power structures, the high representative established three councils, one at the state level and two at the entity level: the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (the State Council); the High Judicial and Prosecutorial Council

of the Federation of BiH (the Federation Council); and the High Judicial and Prosecutorial Council of the Republika Srpska (the RS Council).⁶⁹ The councils became operational on September 2, 2002.

The councils were independent bodies regulating important affairs of the judiciary, in particular the selection, appointment, transfer, discipline, and removal of judges and prosecutors; the supervision of their professional training; and the preparation of budget proposals for all courts and prosecutors' offices.⁷⁰ During a transitional period, which ended on May 31, 2004, the councils were given the additional tasks of restructuring the courts and prosecutors' offices, including the reappointment of almost all judges and prosecutors.⁷¹

During this transitional period, the three councils together had a total of seventeen national members, including six from the Federation, six from the RS, and five from the state level, as well as eight international members, two of whom served as the president and the vice president. The national members of the councils were judges and prosecutors from all levels of the judicial and prosecutorial systems, as well as attorneys. During the transitional period, the high representative had the power to appoint all council members. Each entity council comprised the six members from its entity, two from the other entity, and the eight international members. The State Council included all members of the entity councils, together with the five state-level members.⁷² The IJC, which had some one hundred and twenty staff, served as the secretariat of the councils during the transitional period, while they restructured the judicial and prosecutorial systems and implemented the reappointment process.⁷³ The remainder of this section describes these two transitional processes.

THE RESTRUCTURING OF THE COURTS AND PROSECUTORS' OFFICES

The restructuring of the courts was based on a comprehensive assessment, which applied three principal criteria: caseload of the judges, population served by the court, and distance from the next larger court.⁷⁴ As a result, more than 30% of all first instance courts were closed.

The number of judges and prosecutors needed was calculated on the basis of the inflow of cases. As a result, the councils reduced the number of judges by almost 30%. Once the number of courts and prosecutor's offices, as well as the number of judges and prosecutors for each court and prosecutor's office, was determined, the councils were in a position to initiate the reappointment process.

TABLE 2
Summary of changes to court system, First Instance Courts

ENTITY	PREVIOUS	PROPOSED	CHANGE
Republika Srpska	25	21	-16%
Federation of BiH	53	31	-42%
<i>Total</i>	78	52	-33%

SOURCE: Independent Judicial Commission, “Restructuring of the Court Systems: Report and Proposal,” October 21, 2002, Annex A.

TABLE 3
Number of judge and prosecutor positions as determined by the HJPC

JUDGES	PREVIOUS	NEW	CHANGE
RS District Court judges	56	61	+9%
RS Basic Court judges	227	144	-37%
Fed. Cantonal Court judges	158	120	-24%
Fed. Municipal Court judges	439	304	-31%
<i>Total</i>	880	629	-29%
PROSECUTORS	PREVIOUS	NEW	CHANGE
RS District prosecutors	70	73	+4%
Fed. Cantonal prosecutors	177	172	-3%
<i>Total</i>	247	245	-1%

SOURCE: HJPC, “Periodic Report No. 2,” April 10, 2003, 7.

THE REAPPOINTMENT PROCESS

The reappointment process consisted in an announcement declaring judicial and prosecutorial posts as vacant and a procedure to fill these posts on the basis of merit. All qualified professionals were eligible to apply in an open competition, including external candidates.⁷⁵ Sitting judges and prosecutors also had to (re-)apply for their own or another position. In order to pave the way for the reappointment process, the entity constitutions had to be modified by decision of the high representative removing the guarantee of life tenure for judges (and prosecutors in the RS).⁷⁶

The reappointment process was carried out in several phases with a limited number of courts and prosecutors' offices included in each phase. The councils issued public vacancy announcements for the relevant openings and applicants were required to complete a comprehensive application package and provide a writing sample and copies of relevant certificates and diplomas.⁷⁷ Some two thousand persons applied for a total of 953 posts. Most applicants applied for more than one post resulting in around five thousand applications.

More than 4,800 complaints were received from the public against judges and prosecutors. Most complaints were filed by litigants who were dissatisfied with a court decision, but did not include any allegations of wrongdoing. Such complaints were generally not investigated further. As of May 31, 2004, the Office of the Disciplinary Prosecutor completed the review of 4,514 complaints. Of these, the disciplinary prosecutor deemed 750 founded and included them in the application packages that were forwarded to the councils' nomination panels.⁷⁸

As the secretariat of the councils, the IJC verified that the incoming applications complied with the fundamental requirements, including an examination of compliance with property laws, political affiliations, and of personal assets. Applicants were also required to submit information on service in a military or paramilitary organization, government positions held, and legal activities during the conflict years. The IJC distributed the names of applicants to various international organizations for comment, investigated complaints, and assessed the information available on each applicant. Conflict-related information was, however, of limited use during the reappointment process. The number of conflict-related complaints from the public against judges and prosecutors was small and most conflict-related information was sketchy. The huge amount of overall information that needed to be processed did not allow for extensive independent investigations of conflict-related information. As a

result, while the councils at times did not appoint a candidate on the basis of incriminating conflict-related information, there was no comprehensive background review of conflict-related activities for all applicants. Whether this led to the appointment of unsuitable judges or prosecutors was not possible to ascertain at the time of research.⁷⁹

The verification process performed by the IJC was a time-consuming exercise. Each application averaged fifty-five pages of material without counting verification documentation and investigation reports.⁸⁰ After completing the verification of an application, the IJC submitted a standard documentation package to one of the councils' nomination panels, which decided whom to call for interviews.⁸¹

The nomination panel interviewed the applicants for a vacant post to assess whether they met the required qualifications and ranked in order of preference all nominated candidates. Applicants had the right to review and comment upon their application dossiers. After receiving the recommendations of the nomination panel, the council decided on the appointment for a vacant post and publicly announced its decision.⁸² Although appointment decisions were based on individual merit, the councils strove to ensure proportionate ethnic and gender representation, in accordance with relevant constitutional and legal requirements.⁸³ Ethnic representation was determined in accordance with the last pre-conflict census in 1991.

Sitting judges and prosecutors who were not reappointed could file a written request for reconsideration within fifteen days of publication of the appointment decision. The grounds for reconsideration were, however, very limited under the law. A request for reconsideration could only be filed if material facts that were favorable to the applicant were not considered, provided the information had been submitted with the application; or if the applicant had exercised her or his right to review the application material and the council took an adverse decision on the basis of information not made available to the applicant.⁸⁴ Sitting judges and prosecutors who were not reappointed generally filed requests for reconsideration. All requests were, however, rejected by the councils because they did not meet the limited grounds for reconsideration.⁸⁵

The mandate of a sitting judge or prosecutor who was not reappointed for office was terminated. Nonreappointment did not, however, prohibit the individual from later appointment to a judicial or prosecutorial post. A not-reappointed judge or prosecutor received her or his salary including benefits for a period of six months after termination of mandate.⁸⁶

OUTCOMES, PERCEPTIONS, AND CHALLENGES

OUTCOMES

Of the total of 953 judicial and prosecutorial posts, the councils were able to fill 878 by May 31, 2004. The remaining 75 posts (8%) were not filled during the transitional period due to a lack of qualified minority candidates and were readvertised.⁸⁷ About 30% of the incumbents who applied for their positions were not reappointed (other incumbents did not apply, either because they retired or because they did not want to undergo the reappointment process). Approximately 18% of those appointed by the councils were applicants at large rather than incumbent judges and prosecutors.⁸⁸ Although the councils were not always able to strictly apply the 1991 census breakdown for each court and prosecutor's office, the ethnic composition of the system significantly improved as a result of the reappointment process and is expected to generally reflect the census when the remaining positions are filled.

TABLE 4

Ethnic composition before and after reappointment

REPUBLIKA SRPSKA	BOSNIAKS	SERBS	CROATS	OTHERS
1991 census	28.3%	55.9%	8.9%	6.9%
Before reappointment	2.3%	91.2%	3.7%	2.8%
After reappointment	22.8%	65.6%	8.1%	3.5%
FEDERATION OF BIH	BOSNIAKS	SERBS	CROATS	OTHERS
1991 census	52.2%	22.1%	17.5%	8.2%
Before reappointment	64.8%	9.6%	23.1%	2.5%
After reappointment	56.5%	19.1%	21.9%	2.5%

SOURCE: HJPC, "Final Report," 11

It is too early to assess if the reappointment process has actually led to an improvement in the administration of justice in Bosnia and Herzegovina. However, whatever the concrete impact on the functioning of the judicial system, the restructuring of the courts and the implementation of the reappointment process established conditions that are generally considered necessary

for an independent and professional judiciary and constitute “a key...requirement for BiH’s integration into Europe and Euroatlantic structures.”⁸⁹

PUBLIC PERCEPTIONS

Public opinion polls in Bosnia and Herzegovina before the implementation of the reappointment process showed that confidence in the judiciary was between 41% and 68.4%.⁹⁰ Although confidence in the judiciary was higher than in other official bodies it was lower than in the police, and both domestic and international observers felt that necessary efforts to reform the judiciary either had not taken place or were insufficient or fundamentally flawed.⁹¹ Restoring confidence in the judiciary and its ability to enforce the rule of law was, therefore, one of the principal reasons to put in place an effective reappointment process.⁹² A majority of the public supported the reform of the judiciary and thought it would yield positive results.⁹³ During the reform period, the level of confidence in the judiciary increased to between 60.2% and 74.0%.⁹⁴ It was, however, too early to assess conclusively any changes in public perceptions as the reappointment process had just been completed at the time of research.

Senior domestic judges interviewed for this study generally supported the reappointment process but criticized the “international domination” of the councils.⁹⁵ Judges who were not reappointed alleged that suitable judges and prosecutors had been passed over, and that the reappointment process did not respect their constitutionally guaranteed national rights, in particular the independence of the judiciary.

CHALLENGES AND LIMITATIONS

Political interference. Once reappointments began to gain pace, nationalist political parties and lobbies began to vehemently oppose the process alleging that it violated their constitutionally guaranteed national interests and that the councils were biased in their decisions. Some even requested that the councils be abolished and that the political parties be given the right to appoint judges and prosecutors.⁹⁶

These attacks on the councils pointed to a broader pattern of resistance by nationalist parties and their constituencies against restoring a multiethnic Bosnia and Herzegovina. Moreover, they revealed that vetting and broader personnel reform processes in the public sector not only affect those individuals selected for or excluded from office but also have general institutional implications, which have an impact on existing power relations and, therefore, often evoke political reactions. These reactions can involve attempts

to manipulate the personnel reform process itself. Decisions on the number and type of personnel of public institutions, as well as on the processes of appointing and excluding them, significantly affect the level of influence that the constituent groups of a society have on their political system.

Restructuring with a limited number of applicants. The scope of opportunities to replace public employees and to restructure the system through a reappointment process is limited by the pool of applicants. Unlike the reappointment process in the former East Germany, for example, where a large pool of West German jurists not affected by the exercise was available to replace the judges who were not reappointed, the pool of potential applicants for judicial and prosecutorial appointments in Bosnia and Herzegovina was small. The country suffered a serious brain drain during and after the conflict, and appeals to jurists to return were of limited success. As a result, no more than some two thousand applicants, including sitting judges and prosecutors, applied for around one thousand posts—about two applicants per post. Therefore, the restructuring of the judicial and prosecutorial systems was difficult to implement. Restoring the multiethnic balance destroyed by the conflict was one of the principal reasons to put in place the reappointment process. However, throughout the entire process, there was an insufficient number of qualified minority applicants due to the small pool of potential applicants and resistance to return, which caused delays in the appointments, a high percentage of reappointments of incumbents, and seventy-five unfilled posts at the end of the transitional period.

VETTING AND TRANSITIONAL JUSTICE

At the time of writing, the main nationalist groups that were responsible for the conflict continued to hold political power in Bosnia and Herzegovina and not only undermined efforts to strengthen the rule of law but also continued to resist attempts to face the past. Bosnia and Herzegovina remained trapped in the nationalist antagonisms of the conflict and the pursuit of transitional justice was largely driven by international actors.

The International Criminal Tribunal for the Former Yugoslavia in The Hague was established in 1993, but nationalist groups in Bosnia and Herzegovina remained adamantly opposed to the tribunal, and several important people who had been indicted remained at large ten years after the signing of the peace agreement. Domestic war crimes trials had generally not taken place. The Bosnian State Court was established in 2002 and a war crimes

chamber in the court began to function in 2005 in view of plans to close down the International Criminal Tribunal. Again, these efforts were initiated by international actors against the resistance of nationalist domestic leaders.

Efforts to establish truth-seeking mechanisms have generally failed, and a truth commission did not get off the ground during the ten-year period following the signing of the Dayton Agreement. In late 2003, however, the Republika Srpska national assembly, acting under great pressure from the high representative, established the Srebrenica Commission. The commission was formed following a decision by the Human Rights Chamber, an internationally-led human rights court in Sarajevo, in which it ordered the RS to disclose the full truth regarding the Srebrenica massacres. Initially, RS authorities obstructed the work of the commission, which led to the removal of several high-level RS officials by the high representative in April 2004. The cooperation of RS officials improved over the following months. The final report of the commission of October 2004 represented the first public acknowledgment by Republika Srpska authorities of the 1995 massacre of more than seven thousand Bosniaks at Srebrenica.

A comprehensive reparations program had not been established by 2005. The Dayton Peace Agreement provided, however, for the right of all displaced persons to have their property restored to them or to be compensated, and established an internationally led commission to process property claims. A high rate of property was restituted to returnees as a result of persistent international pressure.

In many respects, the two personnel reform processes constituted the most comprehensive transitional justice measures implemented so far. As we have seen, both the UNMIBH certification process and the HJPC reappointment process required the exclusion of war criminals from the police, the courts, and prosecutor's offices. Some have suggested that those exclusions constituted "nonprosecutorial sanctions," which were particularly important in the post-Dayton context due to the limitations of international and domestic judicial processes.⁹⁷ Both the certification and the reappointment processes were, however, primarily aimed at reforming institutions. The continued presence of war criminals in the police, the courts, and prosecutors' offices was perceived as a significant obstacle to implementing the peace agreement and building the rule of law.⁹⁸ Through their positions in those institutions, war criminals continued to hold political and economic power and to pursue conflict-era objectives, in particular to prevent the return of minorities. The removal of war criminals was considered an important condition to reestablish trust in the police, the courts, and prosecutor's offices, and

to disable informal criminal networks that existed in these institutions. These processes, therefore, constitute transitional justice measures primarily in the sense that they aim to prevent future abuses, rather than to establish accountability for past abuses.⁹⁹ Indirectly, these personnel reform processes should also assist in establishing accountability, as reformed rule of law institutions might pave the way for domestic efforts to prosecute war criminals.

SOME SYSTEMATIC REFLECTIONS

A comparison of the certification process implemented by the UN Mission in Bosnia and Herzegovina with the reappointment process carried out by the High Judicial and Prosecutorial Councils reveals a number of interesting similarities and differences. Four significant issues arise in comparing the two personnel reform processes and appear relevant to a better understanding of the concept and praxis of vetting in general: the relationship between vetting and institutional reform; review and reappointment, two distinct approaches to vetting; the role of international organizations; and the issue of resource requirements.

VETTING AND INSTITUTIONAL REFORM

The principal rationale for both the UNMIBH certification process and the HJPC reappointment process was comprehensive personnel reform in order to build fair and efficient institutions. Both processes aimed not only at ensuring the required integrity of individual law enforcement agents, judges, and prosecutors, but also pursued broad personnel and institutional reform goals. By means of the certification process, UNMIBH reduced the number of police officers; set the maximum personnel strength of each law enforcement agency; terminated paralegal police activities; raised the number of minority officers in the police; and improved its gender composition. The HJPC reappointment process was part of a comprehensive restructuring of the judicial and prosecutorial systems, in particular a reduction of the number of courts and prosecutors' offices. By means of the reappointment process itself, the councils defined the number of judges and prosecutors and determined their ethnic and gender composition in each court and prosecutor's office.

Vetting processes set the integrity criteria for employment and assess suitability for employment. Criteria for employment define access to and exclusion from public positions. Defining and applying those criteria, then, not only affect the employment situation of individuals but also the future shape

and personnel structure of the public institution in question. An institutional dimension is inherent to any vetting process.

The institutional dimension of a personnel reform program can vary greatly. On one end of the spectrum, a vetting exercise could be carried out as a stand-alone measure aiming at excluding abusers while leaving the mandate, size, and organizational structure unchanged. On the other end of the spectrum, a vetting process may be part of broad institutional reform measures involving changes to the mandate and organizational structure of the institution. Even the mere exclusion of abusers may, however, have significant institutional implications. For example, if a vetting process results in the removal of abusers who cannot be replaced by qualified individuals, the functioning of the institution may be affected negatively. In designing a vetting process, its likely institutional impact should, therefore, be taken into consideration from the outset.

More often than not, countries emerging from conflict or authoritarian rule need to engage in a comprehensive reform program including personnel reform in order to build fair and effective public institutions and prevent the recurrence of abuses.¹⁰⁰ The multifaceted shortcomings of a public institution's personnel often represent an important cause of past abuses. The personnel may, for example, lack qualifications and skills, include human rights abusers, fail to represent the population it is called to serve, or have an inadequate organizational structure. An effective personnel reform program in transitional contexts will identify the various shortcomings of public employees, define a suitable organizational structure, and ensure the selection of competent and representative personnel of integrity.

A vetting process that takes place in the context of comprehensive personnel reform will involve a wide-ranging assessment of the suitability for employment. General criteria for employment in a public institution fall into several broad categories, in particular aptitude, competence, integrity, and representativeness. By aptitude, I refer to basic qualities such as minimum and maximum age, citizenship, and physical and mental fitness. Competence relates to an employee's qualifications such as general education, professional training, and professional experience. Integrity refers to an employee's adherence to international standards of human rights and professional conduct, including a person's financial propriety. Representativeness relates to proportionate gender, ethnic, geographic, and religious composition of an institution's personnel. Depending on the specific circumstances of a transitional situation, the shortcomings of the personnel of a public institution will vary greatly and concentrate in different areas. In post-Dayton Bosnia and

Herzegovina, for example, most police officers had relatively high levels of competence, whereas many officers had significant integrity deficits, female officers were underrepresented, and the police services were dominated by the respective ethnic majority. The personnel reform process, therefore, had to focus on removing those with an inadequate human rights record and improving the representation of women and minorities in the police, while at same time maintaining, and improving where necessary, the competence of police officers.

The Bosnia and Herzegovina example also reveals that the different aims of a personnel reform exercise may compete with each other and that the design of such processes may imply difficult trade-offs and compromises between those aims. In general, however, the legitimacy of a personnel reform process will depend on attaining certain minimum standards in each of the four categories. A public institution with competent but mono-ethnic personnel, for example, is unlikely to be trusted by other ethnic groups and might not understand the language and concerns of those groups. The personnel of another institution might have high levels of integrity but lack competence. Despite best intentions, these personnel will not be able to fulfill the mandate of their institution. What those minimum standards are concretely will depend on the specific circumstances of the transition. In terms of integrity, there is, however, a broadly held view that individuals who committed serious human rights or humanitarian law crimes should always be removed from public office.¹⁰¹

If public institutions undergo other reforms that imply changes to their personnel structures, those institutional reform measures will have an impact on the personnel reform process. Before a personnel reform process can be designed under such circumstances, the mandate, organizational structure, and composition of the institutions in question have to be determined. Some institutions might have to be merged, others reduced in size or abolished, and others again reshaped or reoriented. The reforms of the judicial and law enforcement sectors in Bosnia and Herzegovina are cases in point. Personnel reform including vetting, then, presupposes decisions on the number and kind of posts, the gender and ethnic composition, and the ratio of senior staff to middle management to regular staff. Failing to make those decisions might, for example, result in vetting individuals for posts that are discontinued or for which they only partially qualify.

In transitional contexts, personnel reform might also have to be accompanied by other institutional reform measures to effectively improve the performance of a public institution. Representative personnel with high levels

of competence and integrity will not be able to function professionally and effectively if they are not supported by adequate institutional frameworks, procedures, and resources. Other institutional reform measures may include, for example, the creation of civilian oversight mechanisms and civil complaint procedures; the reform or establishment of legal frameworks and internal procedures; the development or revision of a professional code of ethics; changing symbols that are associated with abusive practices; and the provision of adequate salaries, equipment, and infrastructure.

The precise content and scope of those measures will depend on the circumstances of each particular transitional situation. Institutional reform of the police in Bosnia and Herzegovina included the creation of police commissioner posts in each police service to deter inappropriate political interference; the development of new and uniform arrest and police custody procedures that adhere to international standards; the removal of intelligence agencies from police premises; the introduction of new and inoffensive insignia, symbols, and uniforms; the establishment of a separate state border service; and the provision of vehicles, side arms, communication equipment, and other resources. Institutional reform measures in the judicial sector of Bosnia and Herzegovina included the development of new procedural codes; the establishment of professional disciplinary bodies; the redesign of the budgetary process and increased funding; the renovation of premises; and the merger and restructuring of courts and prosecutors' offices. Personnel reform processes often have to be accompanied by a broad range of other measures to ensure that transitional reform of public institutions is effective and sustainable.

REVIEW VERSUS REAPPOINTMENT

The UNMIBH certification process was a review process. Serving police officers were screened to determine their suitability for continued service. If UNMIBH determined, on the basis of defined criteria, that an officer was not fit for service, she or he would not be certified and had to be dismissed. Otherwise, the police officer would be certified and remain employed with the respective agency.

The HJPC reappointment process reversed the fundamental dynamics of a review mechanism. In the context of the reappointment process, the courts and prosecutors' offices were reconstituted, and there was a general competition for all posts of judges and prosecutors that was open to external candidates. A serving judge or prosecutor also had to apply if she or he wanted to

continue to work in the profession. If the serving judge or prosecutor was not appointed to a post, she or he would cease to hold office. Although the goal of the UNMIBH certification process was to remove those who were deemed unfit for service, the aim of the HJPC reappointment process was to select for office the most qualified candidates.

In a review process, fundamental due process requirements apply. In particular, serving employees who are being reviewed should be granted a fair hearing. Applicants in a reappointment process, on the other hand, do not enjoy the same due process protections, as there is no right to be appointed to public office. Applicants have, however, a right to equal access to public service. A reappointment process should, therefore, be based on criteria of equality, and the selection process should ensure non-discriminatory procedures. In a review process, the burden of proof falls on the reviewing body to establish that an official is unfit to hold office. A reappointment process shifts the burden of proof to the applicant, who has to establish that she or he is the most suitable for the vacant post. These procedural simplifications streamline the process significantly.

Under ordinary circumstances, such procedural reversals would likely violate fundamental due process rights of the serving employees who are not reappointed. Moreover, the termination of judges with life tenure raises concerns regarding the independence of the judiciary. However, in a country emerging from conflict or authoritarian rule, a reappointment process facilitates the selection of the most suitable employees, rather than just weeding out those who are clearly unacceptable to hold public office. A reappointment process also provides a better opportunity to undo structural injustices and implement necessary institutional reforms, such as modifying the ethnic or gender composition of a public institution, and facilitates the reduction or reassignment of personnel in the context of a consolidation or disbandment of public institutions.

In states based on the rule of law, constitutional safeguards are in place, in particular the separation of governmental powers, to protect the rule of law and prevent political interference between public institutions, including arbitrary replacements and restructuring.¹⁰² The independence of the judiciary provides special safeguards for judges, in particular the principle of irremovability. Legal provisions generally protect the operational independence of the police. A reappointment process could seriously undermine the rule of law and represents a serious risk of arbitrary interference in the workings of otherwise independently operating sectors. Therefore, the institution of reappointment processes should be limited to exceptional circumstances when

the public institution in question is fundamentally dysfunctional and when an overall improvement of the rule of law is unlikely to be accomplished without it; it should be implemented by an independent body that follows clearly defined, transparent, and fair procedures; and it should be carried out as quickly and as early as possible in the transition to overcome protracted periods of legal uncertainty. The HJPC reappointment process was rightly criticized for the fact that it only started in 2002, seven years after the signing of the Dayton Peace Agreement.

THE ROLE OF INTERNATIONAL ORGANIZATIONS

In general, vetting processes under domestic leadership will be the preferable option to internationalized processes because they prevent resentments against external imposition, provide a better basis for local buy-in and sustainability of the process, and ensure the application of local know-how. Vetting processes are, however, often contested in the fragile political environment of a country emerging from conflict or authoritarian rule, as they affect access to and exclusion from governmental power structures. This is true in particular when representatives of a former abusive government continue to wield formal or informal authority during the transitional period and stand to lose power and influence through the vetting process. Considerable international pressure might be required to implement an effective and fair vetting process under such circumstances.

Post-Dayton Bosnia and Herzegovina is a case in point. The war ended at Dayton with a coerced compromise. The implementation of the peace could not be left to those who were responsible for the conflict and saw the post-Dayton situation as an opportunity to continue the conflict through other means. Significant international leverage would be necessary for a prolonged period to create conditions for a self-sustaining peace.

The strategy of international intervention in post-Dayton Bosnia and Herzegovina is a controversial topic.¹⁰³ Although there is general agreement that the early cautious and wavering style of international civilian involvement played into the hands of those extreme nationalists who opposed the signing of the Dayton Peace Agreement in the beginning, there is much debate over the productivity and sustainability of the later heavily interventionist approach. At the time of the UNMIBH certification and HJPC reappointment processes, international actors had firmly imposed themselves on Bosnia and Herzegovina and the international regime had turned into a quasi protectorate. Whatever the merits and shortcomings of the interventionist approach, it

provided the high representative and the United Nations with the powers to impose vetting processes on domestic institutions.

International involvement in a vetting process requires an invitation from domestic authorities or, in the case of domestic opposition and resistance, an international mandate that provides international actors with the authority and means to intervene directly in domestic affairs and overrule domestic procedures if necessary. Depending on the circumstances and the mandate, international actors could advise domestic authorities in designing a vetting process; assist in its implementation through training, advising, monitoring, and the provision of resources; or take the lead role and establish an internationalized vetting process.

When an internationalized process is established, every effort should be made to involve domestic actors as broadly as possible, to ensure its integration into domestic law, and to put in place provisions guaranteeing a seamless changeover from the extraordinary transitional vetting process to regular domestic selection and recruitment procedures. In this regard, the shortcomings of the UNMIBH certification process were significant. The certification process relied exclusively on international resources and actors, who applied internal guidelines that were not integrated into domestic law. There was no domestic involvement in the UNMIBH certification process except when it came to executing decertification decisions: the relevant minister of interior was informed in writing that UNMIBH was decertifying a certain police officer and that the minister had to dismiss the officer.

When UNMIBH came to an end in 2002, the certification process was concluded with some haste and the follow-on European Union police mission shied away from any further involvement. The UNMIBH local police registry with personnel files of around twenty-four thousand currently or previously employed local police officers and other Ministry of Interior personnel was shipped off for storage in the UN archives near New York City, rather than being turned into a national police personnel registry. No mechanism was put in place either to review contested decisions following UNMIBH's departure or to ensure that those who were not certified would not be rehired. The failure to build a sustainable domestic follow-on mechanism and to ensure transfer of skill and knowledge to it resulted in legal uncertainty, real confusion over the status of noncertified officers, and serious challenges to the entire certification process.

Although it was too early at the time of writing to assess the legacy of the HJPC, the reappointment process was better integrated into the domestic system, ensuring a smooth transfer to a domestic follow-on mechanism. The

reappointment of judges and prosecutors was carried out by mixed domestic-international councils on the basis of legal statutes that were published in the official gazette. Following the conclusion of the reappointment process, the three councils were merged into one that was entirely nationalized and functioned as a permanent domestic judicial commission. International staff stayed on in advisory and support functions. The HJPC remained the final independent authority on personnel matters, and continued to oversee appointments and disciplinary cases of judges and prosecutors. This institutional stability guaranteed the transfer of procedures, information systems, and databases, and ensured continuity of know-how and experience.

RESOURCE REQUIREMENTS OF VETTING PROCESSES

Early efforts to vet the police and the judiciary collapsed, *inter alia*, due to a lack of qualified staff, inadequate resources, and insufficient time. Both the UNMIBH certification process and the HJPC reappointment process were hugely resource-intensive. UNMIBH had more than thirty international and more than twenty national staff members working for a period of three years to implement the registration, provisional authorization, and certification of around twenty-four thousand law enforcement personnel, and legal, project-management, police, and local expertise fed into the exercise. Still, the completion of the process was rushed and marred with problems. The UNMIBH resources were, however, dwarfed by the resources available to the HJPC and the IJC, which had more than 140 staff members to restructure the judiciary and reappoint some one thousand judges and prosecutors. Its sixteen-month mandate had to be extended for another five months to complete the reappointment process, which turned out to be much more complex and time consuming than anticipated, in particular the process of verifying applications by the IJC.¹⁰⁴

Both review and reappointment processes are immensely time- and resource-consuming exercises, in particular when they involve background investigations and the assessment of past conduct. The success or failure of such processes significantly depends on a thorough evaluation of operational requirements and the provision of adequate time and resources.

NOTES

- 1 The term “Bosniak” generally refers to those citizens of Bosnia and Herzegovina who have identified their own nationality as Muslim.
- 2 The author was Chief of the Human Rights Office of the UN Mission in Bosnia and Herzegovina from 1999 to 2001. During this period, he oversaw the initial phase of the screening process but was not involved in the actual certification process. The views expressed in this paper are solely those of the author and do not represent the views of the United Nations.
- 3 In contrast to Slovenia and Croatia, no nationality had an absolute majority in pre-conflict Bosnia and Herzegovina. According to the 1991 census, the country had a population of 4.4 million inhabitants, of which 43.7% declared themselves Bosniak, 31% Serb, 17.3% Croat, and 7.6% Yugoslav or another nationality; <http://www.fzs.ba>.
- 4 The quarter million killed include over twenty thousand missing. Of the around 2.2 million displaced, 1.2 million became refugees in host countries and around 1 million were internally displaced within Bosnia and Herzegovina. For an account of the conflicts in Yugoslavia, see Laura Silber and Allan Little, *Yugoslavia: Death of a Nation*, rev. ed. (New York: TV Books, 1997). For a review of international intervention in Bosnia and Herzegovina, see Elisabeth M. Cousens and Charles K. Carter, *Toward Peace in Bosnia. Implementing the Dayton Accords* (Boulder: Lynne Rienner Publishers, 2001).
- 5 The Bosnian Croats established the so-called Croat Republic of Herceg-Bosna in southern and western Herzegovina. The Bosnian Serbs established the self-declared autonomous Republika Srpska in northern and eastern Bosnia.
- 6 The taking of Srebrenica stands as the most severe atrocity of the conflict. An estimated seven thousand Muslim men were massacred by Serb forces, as the UN, European nations, and the United States stood passively by. See David Rhode, *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre since World War II* (New York: Farrar, Straus and Giroux, 1997), and United Nations General Assembly, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35. The Fall of Srebrenica, A/54/549*, November 15, 1999.
- 7 The Washington Agreement of March 1, 1994, was brokered by the United States government. For the text see http://www.usip.org/library/pa/bosnia/washagree_03011994_toc.html.
- 8 General Framework Agreement for Peace in Bosnia and Herzegovina, December 14, 1995, http://www.ohr.int/dpa/default.asp?content_id=380; hereafter Dayton Peace Agreement.
- 9 The office of the high representative was not integrated into the UN system but was a unique institution created by the Dayton Peace Agreement. The Peace Implementa-

- tion Council was established at the December 1995 Peace Implementation Conference in London and comprised fifty-five countries and agencies.
- 10 Cousins and Carter, *Toward Peace in Bosnia*, 26.
 - 11 Dayton Peace Agreement, Annex 4, Constitution of Bosnia and Herzegovina; hereafter Constitution.
 - 12 Washington Agreement, Article II.
 - 13 Dayton Peace Agreement, Annex 4, Constitution, Article III. Over the following years, the high representative imposed the creation of several state-level rule of law institutions, in particular the State Border Service, the State Information and Protection Agency, and the State Court.
 - 14 Washington Agreement, Article III.
 - 15 There were twelve Ministries of Interior, each with its own police service: the RS Ministry of Interior, the Federation Ministry of Interior, and ten cantonal Ministries of Interior. Brčko District has its own police department in accordance with its special status. This compares with one Ministry of Interior for the entire territory of pre-conflict Bosnia and Herzegovina.
 - 16 Dayton Peace Agreement, Annex 4, Constitution, Article III, para. 2(c), and Annex 11, Agreement on International Police Force, Article I, para. 1.
 - 17 Ibid., Annex 7, Article I, para. 3(e).
 - 18 Ibid., Annex 11, Article I, para. 2.
 - 19 United Nations Security Council, *Establishment of a UN civilian police force to be known as the International Police Task Force (IPTF) and a UN civilian office for the implementation of the Peace Agreement for Bosnia and Herzegovina*, Resolution 1035, S/RES/1035, December 21, 1995.
 - 20 United Nations Security Council, *Report of the Secretary-General*, S/1995/1031, December 13, 1995, 7–8.
 - 21 Dayton Peace Agreement, Annex 11, Article III, para. 1.
 - 22 Ibid., Annex 4, Constitution, Article II, para. 3.
 - 23 Ibid., Annex 6, Article XIII.
 - 24 These figures are based on estimates made by the UN police reconnaissance mission that traveled to Bosnia and Herzegovina in November 1995. See United Nations Security Council, *Report of the Secretary-General*, S/1995/1031, 7.
 - 25 United Nations Security Council, *The Situation in Bosnia and Herzegovina*, Resolution 1088, S/RES/1088, December 12, 1996.
 - 26 Bonn Peace Implementation Conference—Summary of Conclusions, Article XI, para. 2, December 10, 1997, http://www.ohr.int/pic/default.asp?content_id=5182#07.
 - 27 Agreement on Restructuring the Police Federation of Bosnia and Herzegovina, April 25, 1996, <http://www.ohr.int>; hereafter Bonn-Petersburg Agreement. The agreement was signed in Petersburg near Bonn by Bosniak and Bosnian Croat representatives in the

- presence of representatives of the Office of the High Representative and UNMIBH. See also Madrid Declaration of the Peace Implementation Council Declaration—Annex, December 16, 1998, Article II, para. 16, http://www.ohr.int/pic/default.asp?content_id=5191.
- 28 Framework Agreement on Police Restructuring, Reform and Democratisation in the Republika Srpska, December 9, 1998; hereafter RS Framework Agreement. The agreement was signed in Banja Luka by the Republika Srpska government and UNMIBH representatives, following extremely difficult and protracted negotiations with Republika Srpska authorities (copy on file with author).
 - 29 RS Framework Agreement, paras. 16–22.
 - 30 “Policy on Registration, Provisional Authorization and Certification,” IPTF-Po2/2000, May 2000; “Policy on Revised Maximum Strength of Ministries of Interior in the Federation of Bosnia and Herzegovina,” IPTF-Po3/2000, July 2000; “Policy on Revised Maximum Strength of the Ministry of Interior in Republika Srpska,” IPTF-Po4/2000, September 2000; “Policy on Removal of Provisional Authorization and Disqualification of Law Enforcement Personnel in BIH,” IPTF-P10/2002, May 2002; and “Policy on Certification of Law Enforcement Agencies Personnel,” IPTF-P11/2002, August 2002 (copies of policies on file with author).
 - 31 IPTF Policy P11/2002 and IPTF Policy Po2/2000, paras. 2–4.
 - 32 For details on the criteria, see IPTF Policy Po2/2000, paras. 6–7.
 - 33 For a comprehensive description and discussion of the certification process see Gregory L. Naarden, “Non-Prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials,” *American Journal of International Law* 97 (2003): 342–52.
 - 34 For example, UNMIBH checked over 29,000 school diplomas of police officers; 471 police officers were denied certification because they had submitted forged school or university diplomas.
 - 35 IPTF Policy P10/2002, para. 2(h).
 - 36 The criminal codes of Bosnia and Herzegovina incorporate war crimes and crimes against humanity provisions from international law. Criminal Code of the Federation of Bosnia and Herzegovina 1999, Article 154; and Criminal Code of the Republika Srpska 2000, Article 433.
 - 37 Naarden, “Non-Prosecutorial Sanctions,” 348.
 - 38 RS Framework Agreement, para. 19; and Bonn-Petersburg Agreement, concrete steps, para. 4. In practice, SFOR never used these powers, as it was extremely reluctant to involve itself in nonmilitary aspects of the Dayton implementation.
 - 39 Madrid Declaration of the Peace Implementation Council Declaration—Annex, Article II, para. 16.
 - 40 IPTF Policy P10/2002, paras. 10–11; and IPTF Policy P11/2002, para. 13–14.

- 41 United Nations Security Council, *Report of the Secretary-General, S/2002/1314*, December 2, 2002, 3. This panel was established after a legal opinion received from the UN's Office of Legal Affairs in New York supported the requirement to establish an appeals process.
- 42 The December 2002 report was UNMIBH's final official report to the Security Council. The total figures indicated in the report do not add up. Moreover, neither the UN nor the EU was able to provide the author with a breakdown according to the reasons for denying provisional authorization and certification.
- 43 UNMIBH, Human Rights Office, internal reports (copies on file with author).
- 44 Confidential interviews by author, Sarajevo, November 17, 18, 19, and 20, 2003. One former high-ranking crime inspector said that, today, he could not even work as the night watchman at the Ministry of Interior.
- 45 In 2000, confidence expressed in the police was between 46.2% and 73.3%; in 2003, it was between 63.2% and 79%. UNDP Early Warning System in Bosnia and Herzegovina, *Annual Report 2000*, 16–17, and *Annual Report 2003*, 15–16, <http://www.ews.undp.ba/eng/izvjestaji.asp>.
- 46 UNMIBH, "Human Rights Office Reports" (copies on file with author). Lack of security was usually cited as one of the reasons for minorities not to return to their places of origin.
- 47 UNDP Early Warning System in Bosnia and Herzegovina, *Annual Report 2000*, 17, and *Annual Report 2003*, 15–16.
- 48 Louis Joinet, UN Special Rapporteur on Impunity, *Question of the impunity of perpetrators of human rights violations (civil and political)*. Revised final report prepared by Mr. Joinet, pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1 (1997), 28–29 (noting that in the context of vetting proceedings in transitional contexts, an ad hoc commission might be established that meets minimum conditions of independence and impartiality).
- 49 International Commission of Jurists, *The Rule of Law and Human Rights. Principles and Definitions* (Geneva: International Commission of Jurists, 1966), 21 (listing basic conditions that ought to be met in administrative proceedings to preserve the principle of a fair hearing). The applicability of due process guarantees to disputes between administrative bodies and civil servants is, however, contested. The European Court on Human Rights holds that disputes raised by public servants, in particular police and military, are not covered by the due process requirements of the European Convention (*Pellegrin v. France* [December 8, 1999], 1999-VIII Eur. Ct. H.R. para. 66). In spite of this precedent, the Human Rights Chamber of Bosnia and Herzegovina did not follow the European Court and decided that the complaint of a former police officer was admissible (*Dzafirovic v. Federation of Bosnia and Herzegovina* [December 3, 2003], CH/03/12932). Along similar lines, the Human Rights Committee and the Inter-American Court of Human

- Rights, as well as quasi-judicial bodies and legal scholars hold that due process guarantees apply to any proceedings that determine the rights and obligations of a person, irrespective of the function she or he occupies.
- 50 The “grounds of suspicion” standard used in the UNMIBH certification process is a prima facie standard, which is required to indict a suspect in criminal proceedings, but does not provide enough certainty for findings in civil or administrative proceedings. Under the “balance of probabilities” standard, the vetting body is to follow the version of events that appears the more probable, reasonable or likely, after taking all the evidence into account.
 - 51 The principle of legality requires that state action is governed by publicized legislation, enabling an individual to obtain knowledge of her or his rights and duties under the law. See also Joinet, *Question*, 28.
 - 52 UNMIBH, “Mandate Implementation Plan,” Core Program 1, Goal 1.1, Project A, <http://www.unlos-bih.org>.
 - 53 European Union Police Mission, “Planning Development Guidance No. 7” (March 10, 2003), 3 (copy on file with author).
 - 54 *Džaferovic v. Federation of Bosnia and Herzegovina* (December 3, 2003), CH/03/12932.
 - 55 United Nations Security Council, *Twenty-fifth Report of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General*, S/2004/126, February 20, 2004, 20.
 - 56 United Nations Security Council, *Statement by the President of the Security Council*, S/PRST/2004/22, June 25, 2004, 2.
 - 57 In November 2005, High Representative Paddy Ashdown called, for example, on the Security Council to establish a review mechanism for contested certification decisions. Office of the High Representative, “HR Meets Decertified Police Officers,” Press Release (January 16, 2006), http://www.ohr.int/print/?content_id=36376.
 - 58 International Crisis Group, *Courting Disaster: the Misrule of Law in Bosnia and Herzegovina*, Europe Report No. 127, March 25, 2002, <http://www.crisisgroup.org/home/index.cfm?id=1497&l=1>.
 - 59 UNMIBH Judicial System Assessment Program, “Political Influence. The Independence of the Judiciary in Bosnia and Herzegovina,” Thematic Report 9, November 2000, 8, http://www.esiweb.org/pdf/bridges/bosnia/JSAP_ReplX.pdf.
 - 60 International Crisis Group, *Courting Disaster*, 1.
 - 61 PIC Luxembourg Declaration, June 9, 1998, par. 36, http://www.ohr.int/pic/default.asp?content_id=5188; and Madrid Declaration of the Peace Implementation Council Declaration—Annex, Article II.
 - 62 Charles Erdmann, “Assessment of the Current Mandate of the Independent Judicial Commission and a Review of the Judicial Reform Follow-on Mission for Bosnia and Herzegovina,” November 2001, 6 (internal document, copy on file with author).

- 63 Independent Judicial Commission, "The Reinforced Review of Judges and Prosecutors in Bosnia and Herzegovina: Preview Paper for Peace Implementation Council Meeting," February 4, 2002, <http://www.hjpc.ba>.
- 64 The so-called constituent peoples decision of the Constitutional Court required proportional representation of the three peoples in governmental bodies. See Constitutional Court of Bosnia and Herzegovina, *Partial Decision with Regard to the Constitution of the Republika Srpska*, U 5/98 III (July 1, 2000), OGBH No. 23/00 of 14/9/2000, <http://www.ccbh.ba>.
- 65 The Council of Europe might have come to a different conclusion if the reappointment process had taken place right after the signing of the Dayton Peace Agreement, at a "moment of revolutionary change when earlier rules lose their legitimacy." Confidential interview, New York, September 17, 2003.
- 66 International Crisis Group, *Courting Disaster*, 37.
- 67 Independent Judicial Commission, "The Reinforced Review," 3.
- 68 Council of Europe experts were particularly concerned that the criteria for reappointment would not be clearly defined and that judges would be removed on the basis of unproven allegations of bias or corruption. Therefore, they recommended that questions of prejudice, bias, or corruption be treated separately, in disciplinary or criminal proceedings. Confidential interviews, New York, September 11 and 17, 2003.
- 69 Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, OGBH 15/02 (July 2, 2002), hereafter LHJPC/BiH; Law on the High Judicial and Prosecutorial Council of the Federation of Bosnia and Herzegovina, OGFHB 22/02 (June 5, 2002), hereafter LHJPC/F; and Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, OGRS 31/02 (June 10, 2002), hereafter LHJPC/RS, <http://www.ohr.int>. As with many laws in post-Dayton Bosnia and Herzegovina, the laws establishing the three councils had to be imposed by the high representative, since general resistance to enact legislation that would infringe on perceived nationalist interests would prevent the legislative assemblies from passing these laws in the foreseeable future, and the international community saw an urgent need to reform the judiciary. The three laws are largely identical. For ease of reference, I will refer to the law of the Federation Council only.
- 70 LHJPC/F, Article 18.
- 71 Ibid., Articles 75 and 79. The transitional period was initially projected to end on December 31, 2003. As the councils were not able to complete the reappointment process by this date, the transitional period was extended for a period of five months until May 31, 2004.
- 72 Ibid., Articles 5 and 76.
- 73 Ibid., Article 78; Independent Judicial Commission, "Uniting Judicial Services: Achievements. 1 September 2002–31 August 2003," September 24, 2003, 4, <http://www.hjpc.ba>.

- 74 Independent Judicial Commission, "Restructuring the Court Systems: Report and Proposal," October 21, 2002, 7, <http://www.hjpc.ba>.
- 75 LHJPC/F, Article 79. The reappointment process was regulated in the HJPC laws and joint rules of procedure (adopted on October 2, 2002), <http://www.hjpc.ba>.
- 76 Judges may "exceptionally cease to hold office pursuant to a selection process following restructuring of... [the] courts during the transitional period." High Representative, *Decision Amending the Constitution of the Federation of Bosnia and Herzegovina*, May 23, 2002, http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=8452.
- 77 LHJPC/F, Articles 34–35; Rules of Procedure, Articles 21–24.
- 78 LHJPC/F, Articles 47–61; HJPC, "Final Report. September 2002–May 2004," November 2004, Annex 3, <http://www.hjpc.ba>.
- 79 Confidential interview, Sarajevo, November 18, 2003.
- 80 Independent Judicial Commission, "Uniting Judicial Services," 11.
- 81 HJPC, Rules of Procedure, Articles 25–26.
- 82 LHJPC/F, Articles 36–43; Rules of Procedure, Articles 27–32.
- 83 Constitution of the Federation of Bosnia and Herzegovina, Article IX.11a, as amended by High Representative, "Decision on Constitutional Amendments in the Federation, Amendment LII," April 19, 2002, <http://www.ohr.int>; and LHJPC/F, Article 41.
- 84 LHJPC/F, Article 79; Rules of Procedure, Article 33.
- 85 HJPC, "Periodic Report No. 5. 1 October–31 December 2003," January 5, 2004, 4, <http://www.hjpc.ba>.
- 86 LHJPC/F, Articles 81–81a; Rules of Procedure, Article 38.
- 87 HJPC, "Final Report," 11–12 and Annex 2.
- 88 HJPC, "Final Report," 17.
- 89 Peace Implementation Council, "Steering Board Ambassadors Warn Against Attempts to Politicise HJPC Process," January 7, 2004, <http://www.ohr.int>.
- 90 UNDP Early Warning System in Bosnia and Herzegovina, *Annual Report 2000*, 16–17.
- 91 International Crisis Group, *Courting Disaster*, 1.
- 92 Independent Judicial Commission, "An Alternative Strategy to Verify the Competency of the Judiciary: A Re-appointment Process," December 18, 2001, 8 (internal document, copy on file with author) (expressing the expectation "that the public would have greater confidence in... judges and prosecutors once the re-appointment process is completed").
- 93 UNDP Early Warning System in Bosnia and Herzegovina, *Annual Report 2000*, 16.
- 94 *Ibid.*, 16–17.
- 95 Confidential interviews, Sarajevo, November 18 and 19, 2003.
- 96 *Dnevni Avaz*, December 19 and 21, 2003. Quoted in HJPC, "Periodic Report No. 5. 1 October–31 December 2003," January 5, 2004, 5, <http://www.hjpc.ba>.
- 97 Naarden, "Non-Prosecutorial Sanctions," 342–52.

- 98 International Crisis Group, *War Crimes in Bosnia's Republika Srpska: Who Are the People in Your Neighborhood?*, Europe Report No. 103, November 2, 2000, 2, 80–82, <http://www.crisisweb.org>.
- 99 Joint, *Question*, 10 (classifying vetting as a measure of nonrecurrence). Under circumstances of limited or delayed criminal prosecutions, as in Bosnia and Herzegovina, the exclusion from public service of abusers may, however, also help to fill the so-called impunity gap by providing a partial measure of noncriminal accountability. Exclusions from public service have a punitive effect as they take away or preempt employment, public authority, and other privileges and benefits.
- 100 Joint, *Question*, 10 (listing various measures of institutional reform).
- 101 Juan E. Méndez and Javier Mariezcurrena, "Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection," *Social Justice* 26, no. 4 (1999): 84–106 (stating that "the obligation to purge the armed and security forces of undesirable elements" is an emerging principle in international law). See also Joint, *Question*, 10.
- 102 United Nations General Assembly, *Strengthening the rule of law: Report of the Secretary-General*, A/49/512, October 14, 1994, 5 (noting that the protection of human rights under the rule of law requires a strong constitution, which, inter alia, "[d]efines and limits the powers of government and its various branches, vis-à-vis each other, and the people").
- 103 International Crisis Group, *Bosnia: Reshaping the International Community*, Europe Report 121, November 29, 2001, <http://www.intl-crisis-group.org>; Cousens and Carter, *Toward Peace in Bosnia*, 129; Gerald Knaus and Felix Martin, "Lessons from Bosnia and Herzegovina. Travails of the European Raj," *Journal of Democracy* 14, no. 3 (2003): 60–75; and International Crisis Group, *Bosnia's Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building*, Europe Report 146, June 22, 2003, <http://www.intl-crisis-group.org>.
- 104 Of note is that the German Federal Authority for STASI Records, which is mandated to manage and archive the STASI files, and to provide information on the files, maintained 2,397 staff in 2003, its twelfth year of existence; see <http://www.bstu.de>.

CHAPTER 6

The Politics of the Lustration Law in Poland,
1989–2006

Adam Czarnota

INTRODUCTION

The Polish lustration law is a brief text, and is not particularly unusual in comparison to lustration legislation in other former communist states. It is, in fact, rather dull and boring. The law was the outcome of a legislative compromise. It is not radical in terms of penalties, but it is broad in terms of the groups required to undergo the lustration procedure. It penalizes specifically only the telling of a “lustration lie,” rather than membership in or collaboration with communist secret services. The most interesting, if not fascinating, part of the law is its political context or, in other words, the politics of the lustration law in Poland. A “black letter” analysis of the law alone cannot provide answers to questions about why the lustration law was adopted so late, why it is so “soft,” to what preliminary outcome its introduction has led, and what obstacles it has faced to its full implementation. It is difficult, if not impossible, to access all the data necessary to answer these questions because the process remains under way. Even describing what direction to look in order to find answers is not an easy task and requires the application of different methods—hence the hybrid structure and methodology of this chapter. Lustration is a very contested issue; it is nearly impossible to adopt a neutral position toward it.

Importantly, in the context of a project such as this one, the discussion about “lustration”—which in other places goes by “vetting”—in Poland, as in other post-communist countries, focused narrowly on electoral and some other highly public offices (in the sense of those institutions’ role in public opinion formation) plus the judiciary and advocates, but not on processes of personnel renewal in, for example, security sector institutions. This is so despite the fact that, as I will show below, some of these institutions in fact established rather ambitious personnel screening procedures.¹ Screening for human rights abuses and other forms of misconduct that took place, on a fairly large scale, within some areas of the security sector was not called “lustration” *sensu stricto*. It was called “verification of personnel” [*weryfikacja*],

and I refer to it later as “vetting.” In public discourse, the term “lustration” was used in the restrictive sense explained here, and this will be the real focus of this chapter.

The Polish lustration law has been in operation for just six years. The lustration law adopted by the Polish Parliament on April 11, 1997 (uniform text *Dziennik Ustaw*, 1999, Nr 42, poz. 428), formally became valid law on August 3, 1997, but could not be enforced without the creation of a Lustration Court. After the amendments of June 18, 1998 (*Dziennik Ustaw*, Nr 131, poz. 860), which entered into effect on November 27, 1998, verification of lustration declarations was made possible. Full enforcement became possible on December 1, 1998, with the creation of the V Department (Lustration Court) in the Warsaw Appellate Court. A commissioner for the public interest was nominated by the chief justice of the Supreme Court, Adam Strzembosz, on October 16, 1998, and formally took office on January 1, 1999.

In the next section, I describe the sometimes dramatic history of the lustration debate and legislation in the Polish III Republic. I then provide an overview of the lustration law itself, and examine the functioning of the law over the past six years. In the following two sections, I evaluate the lustration law from both a public opinion perspective and in terms of its success in achieving its stated aims. In the final section I analyze the Polish lustration law from the point of view of a post-communist social theory.

HISTORY OF LUSTRATION IN POST-1989 POLAND

INTRODUCTION

The present lustration law is the result of many years of debate regarding lustration, its form, and its substance. This debate was conducted both within and outside of Parliament. The question of dealing with the communist past in some form, formulated broadly as the “lustration issue,” crystallized during the debate around three points:

- lustration proper, which means screening and barring from public office former collaborators and members of secret services who committed “lustration lies”;
- access to secret services files; and
- decommunization, which refers to all political and legal strategies aimed at eradicating the legacies of communism in the social and political system. Lustration is part of decommunization but is analytically narrower in scope. In particular, decommunization includes

a legal ban of communist parties, the confiscation of the property of communist parties, the penalization of the use of communist propaganda, the use of criminal law against former communist officials, and so on.²

These issues, together with other legal strategies, such as restitution of property and retributive justice for former communist crimes, constitute the legal dimension of the crucial problem euphemistically called “dealing with the past.” In the case of the peaceful transition of power in Poland, these issues were and are hotly debated. Quite often it is very difficult to separate them, even analytically, especially lustration from decommunization. The aim of this chapter is to focus on the lustration law alone. It is puzzling that the first country to break with the monopoly of Communist Party rule was not the first to adopt a lustration law. There is no shortage of explanations, however, some of which are explored throughout this chapter.

Since 1989 it is possible to distinguish three different phases in Poland's approach to the lustration issue, legislation, and legal implementation. The discussion about lustration can be seen as a process of growing awareness of the nature of lustration and of differentiating it from other transitional justice measures. The first phase, between 1989 and 1992, was characterized by broad and chaotic debates about dealing with the past, only part of which concerned lustration. The second phase, between 1993 and 2001, was occupied by attempts to clarify the lustration issue and create the legal-institutional framework to deal with it. The main result of this phase was the adoption of the lustration statute of April 11, 1997, as a result of compromise between political forces in the Sejm, the lower house of the Polish Parliament. The third phase, which began in 2001, is a by-product of the change in the configuration of political forces that followed the 2001 election, won by the post-communist Democratic Left Alliance [*Sojusz Lewicy Demokratycznej*] (SLD).³ This phase has been characterized primarily by legislative attempts to restrict the scope of lustration.

HISTORY OF THE ISSUE⁴

The first suggestions that some sort of lustration was necessary came in 1990 from the Citizen's Parliamentary Club [*Obywatelski Klub Parlamentarny*] (OKP), which included all members of the so-called contract parliament (meaning it was not fully freely elected) from the anti-communist opposition. Roman Bartoszcze, a Member of Parliament (MP) from OKP, and one of the leaders of the independent peasant's movement, argued the necessity of screening secret

police files for reasons of state security and to critically deal with Poland's communist past. Bartoszcze created a political storm within the opposition political forces by urging the investigation of the relationship between some members of the OKP and the communist secret police, the Security Service [*Służba Bezpieczeństwa*], well known by the abbreviation SB.⁵ The first post-communist governments—the political base of which was in the OKP—such as Tadeusz Mazowiecki's and then Krzysztof Bielecki's, failed to take up Bartoszcze's suggestion.

The Senate, the upper chamber of the Polish Parliament, prepared a draft verification procedure for candidates running for election to Parliament in 1991. The draft, which suggested screening candidates for collaboration with the communist secret services, was voted down. Another attempt involved a secret list of parliamentary candidates who had collaborated with the secret police during the communist period, prepared in 1991 by Andrzej Mielczanowski, the head of the State Security Office [*Urząd Ochrony Państwa*] (UOP). The justification for compiling this list was the security of the state; it was treated as part of the security screening mechanism presumed to exist in all democratic states. If we take into account the fragility of the political situation in 1991, the close connection between Mielczanowski and President Lech Wałęsa, and especially Mielczanowski's role in the so-called Józef Oleksy scandal in 1995,⁶ it is highly probable that this list played an important political role as part of the efforts of Wałęsa's political camp to discredit its opponents and improve its own position.

Right-wing-oriented political parties supported lustration and decommunization. A new impetus for dealing with the issue of lustration came after the election in 1991, when Antoni Maciarewicz became the minister of internal affairs in the right-wing Olszewski government. Maciarewicz had been a member of the anti-communist opposition since 1976 and a member of the famous Workers' Defense Committee [*Komitet Obrony Robotników*] (KOR), together with Jacek Kuroń and Adam Michnik. From the very beginning, Maciarewicz represented nationalist and Catholic ideology in the opposition movement. He was also editor of the influential samizdat journal *Głos*. In his new position, Maciarewicz organized a department of studies in the cabinet of the minister of internal affairs that focused on the archival resources of the secret police of the Polish People's Republic.⁷ The aim of the unit was to prepare a report that would show the danger to state structures if lustration were to be abandoned.

The next dramatic act took place in May and June 1992. On May 28, the Sejm adopted a motion proposed by Janusz Korwin-Mikke, leader of the radi-

cally liberal libertarian political party, which obliged the minister of internal affairs to present full information to the Sejm by June 6 about higher civil servants and members of both parliamentary chambers who were secret collaborators with the communist secret police between 1945 and 1990. The motion required Maciarewicz to provide full information about judges, public prosecutors, and advocates within two months, and information about representatives of local territorial self-governing bodies at different administrative levels within six months. This motion, adopted by the Sejm, became the legal basis for the minister's actions. On June 4, Maciarewicz presented to the MPs a document from the archival resources of the Ministry of Internal Affairs in relation to MPs, senators, and persons holding high-level offices in the state. The list of sixty-four names included: the new president of Poland, Lech Wałęsa; three ministers; eight deputy ministers; three officers from the president's office; thirty-nine members of Parliament; and eleven senators. It is not surprising that making such a list public created a political storm. The minister stressed that the list was not one of collaborators with the communist secret police; rather it referred to individuals about whom information was available in the ministry's archives. He suggested that a special commission be organized, with the chief justice of the Supreme Court as head, to verify these materials. The idea of lustration, however, was compromised by the ensuing political scandal.⁸

Opponents of the idea argued that it was purely an act of political revenge. The transformed communist party opposed lustration and claimed that, for the sake of reconciliation, all lustration efforts should be abandoned. Another argument used by liberal-democratic forces, represented mainly by the Democratic Union [*Unia Demokratyczna*], stressed the legal continuity between the communist Polish People's Republic and the post-communist Third Republic, which, they argued, precluded any act of political revenge. This position, expressed quite often by Adam Michnik and his newspaper *Gazeta Wyborcza*, stressed the transfer of power through round-table talks as a decisive moment. The former communists had recognized the opposition, and, as a result, the political agreements achieved at the round-table talks between the two sides (the communists and the opposition) were translated into constitutional and legal language.

The consequence that Michnik derived from this peaceful form of transfer of power was a sort of self-limitation of both the former communists and the opposition. The new post-communist period began not as a result of revolution but of cooperation between two political camps through legal reforms. One of the first amendments to the communist constitution was a provision

that Poland was a law-governed state [*Rechtsstaat*]. This had its own consequences. This legal argument had a political dimension in the Polish sociopolitical landscape. Some of the leading political forces in the Democratic Union looked for a coalition between reformist elements in the former communist party and liberal-democratic forces as a necessary political precondition for the successful modernization and democratization of society and the state. For members or sympathizers of the right-oriented political parties, by contrast, the political compromise—which was a virtue for the liberal left—was the original sin of the Polish III Republic, a corrupt foundation upon which it was impossible to build a new democratic society and its political institutions. The right-oriented political forces looked to lustration as a partial remedy for this original mistake.

In order to understand the discussion about lustration and decommunization, and the position of particular political forces in these debates, it is also necessary to take into account the economic dimension. The transfer of power in Poland was preceded by the accumulation of economic power by some people from the former political apparatus who were especially connected with the secret services. By 1989 these people were able to translate their political position into being able to extract economic rent. The law-governed-state formula, that is, the rule of law, was then crucial in legally safeguarding the new private property acquired on quite dubious legal grounds. This economic background played a very important, but not always articulated, role in the debate about lustration and decommunization.

Resistance to lustration also came from post-Solidarity⁹ political groupings, such as parts of the Democratic Union and the Liberal-Democratic Congress [*Kongres Liberalno-Demokratyczny*], which used technical arguments to claim that, due to the nature of the documents on which lustration would inevitably be based, it would be impossible to create a just process. Supporters of lustration came from the same Solidarity circles, and looked at lustration as a sort of medicine for the pathologies and problems of transformation. An important part of their arguments focused on the continuation of informal communist structures concentrated around people from the former communist secret services.¹⁰

On June 19, 1992, the Constitutional Tribunal ruled that the minister of internal affairs' action, based on the motion adopted by the Sejm, was unconstitutional. The tribunal found that the Sejm's resolution violated individual dignity and at the same time did not provide any means of protection for persons screened. This led "to the violation of the good name of the persons to whom the information applies and creates a *sui generis* penalty of infamy."¹¹

According to the Constitutional Tribunal, this was inconsistent with the formula of a law-governed state expressed in article 1 of the so-called Little Constitution, the constitutional law in force at the time.

These events had an enduring effect on the public perception of the lustration process in Poland. Generally the mass media presented lustration as one of the following: (1) part of a conspiracy aimed at a coup d'état by right-wing political parties; (2) a conspiracy of political forces connected with the former communist regime and some elements of the post-Solidarity parties to eliminate Jan Olszewski's¹² government; or (3) a totally discredited idea in whatever form.¹³ The events of June 1992, as well as the work of a special parliamentary commission to investigate the execution of the Sejm's lustration motion, which cleared Minister Maciarewicz of the accusation of using the motion for political purposes, created a situation that forced the legislature to address the lustration issue.

In September 1992 the Sejm started debate on six different drafts of a lustration law, prepared by various political parties (including the Solidarity trade union), one of which came from the Senate. Two drafts were, let us say, "soft," proposing only verification and making public knowledge of instances of collaboration with secret services. Other drafts were more severe, proposing lustration and decommunization together; these would ban collaborators and persons who held positions as executive officers at all levels of the Communist Party from holding public positions in the new state. Parliamentary debate thus slid into discussion of decommunization rather than lustration per se.

Lustration as a topic of public debate continued during the parliamentary election campaign of 1993. After the election the majority in the new Parliament was held by a coalition of the post-communist Democratic Left Alliance [*Sojusz Lewicy Demokratycznej*] (SLD) and Polish People's Party [*Polskie Stronictwo Ludowe*] (PSL)—both opponents of lustration. In July 1994 there was debate in the Sejm on eight drafts of a lustration law. Some of these were old drafts prepared before the election and some were new. In this debate one could distinguish not two but three positions.¹⁴ One was held by a group of strong opponents of lustration based around the SLD party. The second was held by a group that consisted of strong advocates of radical lustration represented by the Confederation for an Independent Poland [*Konfederacja Polski Niepodległej*] (KPN); radical lustration, based on the Czechoslovak model, was actually close to decommunization. The third position, held by a centrist group, favored restricted lustration, which meant limiting the group of people to be screened to the top echelon of the former communist state. The radical

opponents succeeded in blocking lustration and for a long time the drafts disappeared from public view.

In June 1996, following internal decisions in the Sejm, when the legislative process started four new drafts were discussed.¹⁵ The basis for the work of the special parliamentary commission for a lustration law was a draft prepared by the post-Solidarity Union of Freedom [*Unia Wolności*], the Union of Labor [*Unia Pracy*], and part of the post-communist PSL. The resulting lustration law was adopted by the Sejm on April 11, 1997. The statute, containing thirty articles, established a mixed model of broad (in the sense that a broad range of people became the object of the law), but not radical, lustration. The radical model was based on a connection between lustration and decommunization. The final outcome was a compromise, and the law only punished the telling of a “lustration lie,” but not conscious collaboration. It did not punish people who consciously collaborated with the secret services but had admitted this publicly. The majority in the Sejm refused to use lustration as a tool for decommunization; the radical Czech model of lustration was turned down. The next year, however, after a parliamentary election in which post-Solidarity forces won, the lustration statute was amended. The amendment adopted on June 18, 1998, made the lustration law more radical and changed its institutional design. Only eight articles remained unchanged.

After its adoption, the political opposition to lustration, mainly former communists and Adam Michnik’s *Gazeta Wyborcza*, mobilized forces to soften the law as much as possible. The first attempt was made by President Aleksander Kwaśniewski.¹⁶ Before signing the new law, Kwaśniewski sent it to the Constitutional Tribunal to determine its constitutionality. The Constitutional Tribunal, in two rulings, confirmed the constitutionality of the law, questioning only two articles. The first was an article that made it possible to restart lustration procedures against persons who had already gone through the process. The tribunal said that, because there were no provisions regarding time limitation on restarting the procedure, the article created a state of permanent insecurity and limitation of freedom. The second article related to the removal of a candidate for the presidency who made a false lustration declaration, which the tribunal said amounted to a limitation of voting rights.¹⁷ At the same time, however, an unexpected obstacle to the implementation of the law came from the judiciary. One of the law’s provisions created a Lustration Court, to which judges would be elected by the judges’ own self-governing bodies. The required judges had not been elected by the deadline. Further amendments were necessary to address difficulties in creating the Lustration Court.

In terms of the operation of the amended lustration law, the most important trend occurred during the third phase of the history of lustration in Poland. After the post-communists won the next election, they initiated a series of amendments aimed at making lustration meaningless. The most important of these was an attempt to restrict the types of facts that could be used as evidence of “collaboration” or “service.” The first step in this direction was an amendment of February 15, 2002, which limited the scope of application of the law by removing from it former collaborators with military intelligence and counterintelligence. Additionally, the amendment introduced a very imprecise clause that exempted from the list of objectionable collaborations actions that did not endanger personal and civil rights and freedoms. The majority of that amendment was struck down by the Constitutional Tribunal’s verdict of June 19, 2002 (K11/02), on purely procedural grounds.¹⁸

Another attempt to limit the impact of lustration came in an amendment of September 13, 2002, which limited the definition of “collaboration” in such a way that, in effect, most forms of what is commonly understood as collaboration were excluded. “Collaboration,” as defined in the amendment, did not include gathering and passing information for intelligence, counterintelligence activities, or activities conducted in defense of the state borders. It also protected those individuals who alleged that they only “pretended” to collaborate, despite their fulfillment of all formal requirements expected from the secret services. This second restriction was inspired by a Supreme Court judgment of October 2, 2002 (Syg. Akt II KKN 311/01), in the cassation¹⁹ case of Marian Jurczyk, one of the leaders of Solidarity in Szczecin, in which the court moved towards a material — meaning substantive — understanding of collaboration.²⁰ In making an evaluation of the outcome of collaboration and not restricting itself to the establishment of the fact of collaboration, the court moved outside the formal application of the legal definition of “collaboration” as stated in the lustration law. The judgment was rightly criticized as unjustified judicial activism.

THE POLISH LUSTRATION LAW

OVERVIEW OF THE LAW

The lustration statute is composed of forty articles in six chapters, plus an annex. There is no legal definition of “lustration” in the text of the statute. The term itself is confusing and has different definitions in different countries. The word lustration became well known after Czechoslovakia’s so-called velvet

revolution. In Czechoslovakia, and then the Czech Republic, *lustrace* meant a ban on the holding of a public position by functionaries of the Communist Party or political police. The application of the term was broad and radical. It included decommunization as such. It meant banning office holders in the communist regimes from public life in new democratic regimes for some time. This broad definition was not, however, adopted by other post-communist countries. They preserved the word “lustration” but, due to their political contexts, gave it a different meaning. This explains part of the confusion in analyses of the lustration laws in post-communist countries.

In the Polish context, lustration means something different and is used in a narrow sense, as the public unveiling of individual connections with the secret services, and only with the secret services, by persons holding public office or candidates for public offices in the newly democratic state. The aim was to cleanse the public space of “wild lustration”—the periodic publication of lists of collaborators and accusations of collaboration with former communist secret services, accusations from which those who suffered them had no means to defend their good names. Wild lustrations had become a powerful weapon in political life in Poland. Those who supported the introduction of a lustration law believed that it would guarantee a minimum level of civility in political discourse, provide citizens with the necessary information to make informed political choices, and defend the categories of people affected by the lustration procedure from manipulation and blackmail. Generally speaking, they thought it would clean up the poisoned atmosphere of public life after communism.

The statute of April 11, 1997, imposes a duty on people born before May 11, 1972—which means all those who were adults according to law before the transfer of power took place in 1989—who hold or are candidates for enumerated public positions in the state, to make a statement regarding their work for or collaboration with secret services (institutions of state security) between 1944 and 1990. The obligation to make a positive or negative lustration statement is imposed on a broad range of people holding executive positions in the state or important positions in the state administration, including the president of the republic, MPs, senators, judges, procurators, advocates, and people holding key positions in Polish Public Television, Polish Public Radio, the Polish Press Agency, and the Polish Information Agency.

Lustration statements consist of parts A and B, as stated in the annex to the statute. Part A is simply a declaration that a person did or did not work for or collaborate with institutions of state security. Part B (not made public)

includes details of work or collaboration in the case of a positive statement. The names of those who make positive statements are published in the official gazette, *Monitor Polski*, or, in the case of candidates for the presidency and the lower or upper houses of Parliament, in electoral proclamations. The names appear without details of the type of collaboration. In this way, those who declare that they were members of or consciously collaborated with the secret services can still be candidates for public office, and the decision about their future is left in the hands of the electorate. The Polish lustration law penalizes only a lie about collaboration, not the collaboration itself.

Verification of a negative lustration statement is performed by the commissioner for the public interest. If there is suspicion of a lie in the lustration statement, the commissioner initiates a case before the Lustration Court. Court rulings confirming lustration lies are made public. The legal effects of such court rulings are different depending on the position held by the person involved. MPs or senators will lose their seats but can run as candidates in the next election. In the case of judges, an additional ruling of the disciplinary court is required.

DEFINITIONS

Despite the lack of a legal definition of “lustration,” the law clearly designates three necessary elements in the lustration process, namely: institutions of state security during the communist regime between 1944 and 1990; persons holding public office; and past collaboration with institutions of state security under the communist regime. Some combination of holding public office or aspiring to hold public office and former employment in or collaboration with the institutions of state security under the communist regime has to exist. The definitions of these elements are therefore crucial.

Article 2 of the statute defines the *security institutions of the state* as all secret services in Poland, including intelligence and counterintelligence, between 1944 and 1990. Article 2, subsection 11.2, also includes the military and civil institutions of foreign countries that fulfill the same function as the above-mentioned Polish institutions.

Article 3 enumerates the category of *persons holding public offices*. As mentioned above, these are: the president of the republic, MPs, senators, and persons nominated or elected to executive functions in the state; head of the civil service; directors in ministries, central offices, and *voivodeship* offices (state regional administration);²¹ judges, procurators, and advocates; members of

the board of Polish Public TV and Radio; directors of regional TV and radio centers; the director of the Polish Press Agency; and the director of the Polish Information Agency.

The last definition is *collaboration*. According to article 4.1, “collaboration is conscious and secret collaboration with operational or investigating units or organs of the state security as a secret informer or helper with the gathering of information.” In its 1997 decision the Constitutional Tribunal provided binding interpretation of the notion of “collaboration.” The tribunal stated that a simple commitment to collaborate, even evidenced by a signature, is not sufficient, and that what constitutes collaboration are specific actions such as operational gathering of information and passing it to officers of the secret services.²² Subsections 2 and 4 of article 4 contain limitations on the definition of “collaboration.” These state that collaboration is not an activity that was imposed by statutes, and that “fake collaboration” does not count as collaboration.

An amendment excluded collaboration with state security institutions imposed by law, a situation that could occur when categories of persons (for instance, border guard officers) were obliged by law to collaborate in order to preserve state security. The limitation was based on the idea that collaboration in such cases was a legal duty imposed on individuals, who had to do it even if it was against their will. The counterargument, of a moral nature and put forward by the opposition to the amendment, was that nobody forced people to work in these institutions.

More difficult is the question of so-called fake collaboration, in which a person claims to have signed a document that she or he would collaborate with the secret services without any intention to actually collaborate and that she or he never passed on any information or passed on only unimportant information. Fake collaboration is difficult to prove because of the secret nature of collaboration in general. Due to limited evidence, it is nearly impossible to make any judgment about whether alleged collaboration is fake or not. Furthermore, considering how secret services operate throughout the world, it is safe to say that for them there is no such thing as unimportant information. All information is important and can be put to use at the proper time.

The Polish lustration law is aimed at categories of people who have a special, delineated connection between past and present. The past element is the relation to state security institutions, as employment or collaboration. This group of people is in turn limited, from the point of view of lustration, by another criterion: that they hold specific public offices in the present. In other

words, collaborators with the secret services or former officers of state security institutions who do not hold public offices at present or are not candidates for such offices are outside the purview of the lustration law.

THE OFFICE OF THE COMMISSIONER FOR THE PUBLIC INTEREST

The institution of the Office for the Commissioner for the Public Interest plays a crucial role in the Polish lustration law. The commissioner and two deputy commissioners are nominated by the chief justice of the Supreme Court from among the candidates eligible to become judges who have broad legal knowledge and who were not collaborators with the secret services according to the understanding of the statute. Candidates who agree to be nominated are obliged to make a lustration declaration, which is first analyzed by the chief justice and then sent to the Lustration Court for verification. After verification the commissioner and deputy commissioners are formally nominated for a six-year term in office. They cannot be members of political parties or be involved in any activities that are incompatible with the dignity of the office. They can be removed from office by the chief justice of the Supreme Court only in circumstances strictly enumerated in article 17c. The statute creating this office is meant to guarantee independence for the commissioners on the same level as for judges.

The commissioner, who is involved in all phases of the process, represents the public interest in the lustration procedure. In the initial stage the commissioner evaluates the lustration statement and is responsible for deciding whether it should be sent to the Lustration Court. After the Lustration Court issues a ruling the commissioner is entitled to appeal the decision. The functions of the commissioner are analysis of the lustration declaration; gathering information necessary for evaluation of the declaration; and starting the lustration procedure, described below, before the Lustration Court. The commissioner is also obliged to provide a report of his or her activity annually to the president, Sejm, Senate, prime minister, and chief justice of the Supreme Court.

The commissioner has a supporting office, which by the end of 2001 employed thirty-seven people (including the commissioner and two deputies). Employed staff included nineteen specialists dealing with the lustration verification process (lawyers, historians, political scientists, etc.) and thirteen secretarial staff. The budget of the commissioner's office in 2001 was 4,308,000 Polish zlotys (PLZ) (approximately US\$1,250,000).

INITIATING THE LUSTRATION PROCEDURE

The lustration procedure can be initiated by the commissioner or a deputy commissioner when the standard investigation indicates there is justifiable doubt that a lustration declaration is true. Another option is for the Lustration Court to start the lustration procedure *ex officio* in relation to the commissioner. The Lustration Court can also begin the procedure based on a petition by a person who stated that he or she worked or collaborated under pressure, including threats to the life and health of that person or close relatives.

PROCEDURE BEFORE THE LUSTRATION COURT

Each case is heard by three professional judges (normally, in criminal cases, a hearing by three judges is reserved for serious crimes). In the original lustration law there was a provision for the creation of a separate Lustration Court. After the failure to delegate judges to this court, as described above, an amendment named the Warsaw Appellate Court as the Lustration Court. The judges sitting on the Lustration Court bench are designated by the president of the appellate court. The lustration law includes a provision that judges from the *voivodeship* courts (second level in the hierarchy of courts) can also be delegated to sit on the Lustration Court.

According to article 19 of the law, the lustration procedure is regulated by the Code of Criminal Procedure, with necessary changes as stipulated by the lustration law of April 11, 1997. All provisions of the code apply to the person accused of collaboration. The court, on its own initiative or that of parties to the proceedings, can hold hearings closed to the public. The procedure ends with the written decision of the court, which can be one of three types: stating that a lustration declaration was untrue; stating that a declaration was true; or making a decision to terminate a procedure due to lack of evidence on the basis of which to evaluate the veracity of the lustration declaration. The nonsecret part of the judgment is published in *Monitor Polski*, the official government gazette.

APPEAL AND CASSATION

Within fourteen days of the judgment, parties can appeal the decision of the Lustration Court of first instance. The appeal is then heard by three professional judges, at least two of whom, including the presiding judge, must be appellate court judges. Technically, an appeal is heard at the same Lustration

Court but with different judges. From the decision of the court of the second instance, parties have a right to cassation. Cassation is heard by the Supreme Court within three months.

REOPENING THE PROCEDURE

The lustration procedure can be reopened, after a legally valid judgment is made, in two cases: *ex delicto*, when an illegal act took place with impact on the Lustration Court judgment; or *de novis*, when, after promulgation of a legally valid judgment, new facts are discovered which put in doubt a lustration declaration.

SANCTIONS

The only sanction for an untrue lustration declaration is the loss of moral qualification to hold public office and a ban on holding one for ten years. The statutory requirement for holding public office is moral qualification to do so. Individuals currently in office who are found to have made an untrue declaration automatically lose their position. In the case of some professions, for instance retired judges, individuals also lose what amounts to their retirement pensions. This is due to the legal construction that judges do not retire but rather, after reaching retirement age, are not in active service. They do not receive a pension as such but a percentage of their actual salary.

FUNCTIONING OF THE LUSTRATION LAW

Lustration as a topic in the context of transformation and decommunization in Central and Eastern Europe has a history of more than sixteen years. The lustration law in Poland, by contrast, has only been in force for six years. It is thus easier to illustrate some of the problems with the functioning of the lustration law than to make an overall holistic evaluation.

It must be kept in mind that the stated aim of the lustration law was the security of the state and the elimination of potential political blackmail. However, in Polish public opinion there is another aim that is not explicitly stated in the statute, namely, the realization of some sort of transitional justice. Lustration in public opinion is a substitute for decommunization, in this instance in the sense of major personnel turnover in the various state institutions. It is doubtful, however, whether this aim is being achieved, even in part, by the lustration law as it was designed by the Polish Parliament. This is due to the

limited nature of the law, the sanctions of which are restricted only to lustration lies. Nevertheless, the connection of lustration with transitional justice made the topic not only “hot” but sometimes explosive. In arguments made in the media, both supporters and opponents disregard the actual provisions of the statute and present the issue as highly normatively charged.

From the very beginning, however, the leading opinion makers in the media, especially the influential newspaper *Gazeta Wyborcza*, covered the lustration process in a critical, if not negative, way, with the aim of turning the public against it. A crucial point in the lustration debate concerned the appointments of retired judge Bogusław Nizieński as commissioner for the public interest and Krzysztof Kauba as deputy commissioner. They were appointed by a former chief justice of the Supreme Court, Adam Strzembosz, on his last day in office on October 16, 1998. The controversy was triggered by two issues: the men who were appointed, and the fact that the appointments were made on the chief justice’s last day in office and without consultation. For several years afterwards, *Gazeta Wyborcza* ran a campaign to discredit lustration by publishing articles that were not only critical, but sought to undermine the integrity of Commissioner Nizieński. Nizieński was a retired judge known for his anti-communist opinions, who never became a member of the Communist Party, but whose career as a judge nevertheless spanned the entire hierarchy of positions in the Polish courts. As he stated in one interview, he perceived his work on the bench as service to the nation and not to the communist state. (Both the commissioner and the deputy commissioner have appeared extremely devoted to their offices and unafraid of controversy.)

One point of contention that was raised in discussions of the lustration law and procedure was the accountability of the commissioner and deputy commissioners. In the statute, article 17a clearly states that both are obliged to act within the law and the constitution, and make annual reports. While neither position appears particularly strong, as designed in the statute the commissioner’s role cannot be reduced to that of a public prosecutor. The commissioner is endowed with the same level of independence as a judge, and yet she or he represents the public interest in the lustration procedure. This peculiarity reflects the specificity of lustration, which is not a typical procedure as in criminal law. The institution represents a new type of legal institution in public law.²³

A second problem was connected to the order of verification of lustration declarations. The commissioner was criticized for focusing first on judges and advocates, a move that was interpreted as taking revenge on the professional groups with which he was most familiar. His argument was that the highest

number of positive declarations occurred within these categories, which made the negative declarations call for strict verification. Commissioner Nizieński explained that screening one person who had made a positive declaration naturally led to other persons from the same profession and territorial region, who, it seemed, had also made false declarations.²⁴ On an alternative view, however, since the primary aim of lustration was the security of the state, and not decommunization, the verification order should have started with crucial positions within the structure of the state. In other words, the importance of the position from the point of view of the security of the state should have determined the order of the commissioner's verification of lustration declarations. Advocates and judges are not as important, in this sense, as ministers and undersecretaries of state. Criticism of the commissioner's activities, in this case, was therefore justified. The amendment that corrected article 17 states that verification should be carried out in the order of state positions enumerated in article 7, starting with the most important.²⁵

The next objection was to the secrecy of the procedure, both during the initial verification conducted by the commissioner and later on before the Lustration Court. There is no easy way around this because classified material is used in the verification procedure and in the hearing before the Lustration Court. On the other hand, it is true that such secrecy goes against the principles of openness of justice. Commissioner Nizieński stated that while the accused usually were not interested in an open trial,²⁶ after requesting a closed hearing they often themselves made statements to the media, which fostered speculation about the entire procedure. This led to suggestions in the newspapers that the Lustration Court was a kangaroo court or some sort of inquisition having nothing in common with justice.

In a number of newspaper interviews and journal articles, commissioners have complained about the negative media coverage, which demonized the work of the first commissioner and focused only on sensational news.²⁷ Commissioner Nizieński was a public figure who did not avoid conflict and was guided by a strong belief in the mission of his office. No doubt his strong personality left its mark on the operation of the office. He was responsible for hiring, determined the organization of the support staff, and, more importantly, influenced public perception of the lustration process. On the other hand, his successor, Włodzisz Olszewski, keeps a low profile in the media, and it is difficult to find any reports on his activity, outside of formal announcements.

At the time of writing, 23,598 people have filled out lustration declarations,²⁸ which, according to the lustration law, are all subject to the commissioner's scrutiny, which obviously imposes a great workload on him and the

deputy commissioners. From 1999 to 2001, 150 persons declared that they had worked for or collaborated with state security institutions and their names were published in *Monitor Polski*. Among those were one secretary of state, five undersecretaries, and one MP. In 2002 not one positive lustration declaration was filed. By April 30, 2004,²⁹ the commissioner had filed 126 cases with the Lustration Court in relation to sixty-nine advocates; twenty parliamentarians; twelve judges; nine ministers, deputy ministers, or higher civil servants; seven public prosecutors; six journalists; and three *voivodes*. By April 30, 2004, the court had made decisions in relation to 103 persons: 79.8% of first instance verdicts and 80% of cases started by the commissioner were appealed. Forty-eight verdicts of the Lustration Court of the second instance were subject to cassation before the Supreme Court, of which eleven have been overturned and twenty-five have been upheld. In fifty-three of the 103 cases the court confirmed that the declaration was not true and in twenty cases it stated that the declaration was true. Fourteen cases were discontinued for various reasons.³⁰

In the first year of his activity, the commissioner sent questions to the state security archives, where files were collected, regarding 2,296 people under verification; in 2000 he sent 4,168 requests for information; and in 2001, 4,174 for a total of 10,638 persons. By the end of 2001, the lustration procedure was finished for 6,689 individuals — 28.35% of all lustration declarations lodged since 1997, when the law was adopted by Parliament.³¹ Out of the 1,896 individuals whose cases were reviewed by the commissioner for public interest, only forty-five had their cases submitted to the court and only twenty-three were found to have told lustration lies.

According to the commissioner's report for 2001, by October 19, 2001, declarations by all people in key positions in the state had been scrutinized. The parliamentary elections in 2001 brought 245 new declarations from MPs and 50 from senators. As part of the verification process, the commissioner and his deputies interviewed forty-seven witnesses in 1999, fifty in 2000, and 112 in 2001. All witnesses were former officers of the secret police, military intelligence, or counterintelligence. Commissioners complained that witnesses were not cooperative and tried to hide the truth. In three cases the commissioner informed the procuracy of obstruction of justice.³²

The commissioner decided not to bring 293 cases before the Lustration Court, despite the fact that the names of those involved were mentioned in the archives of the special services, because there was insufficient evidence to substantiate collaboration due to the destruction of documents. Furthermore, witnesses claimed that they did not remember whether these individuals collaborated with the former security institutions. Among these people,

advocates again made up the biggest group with 181, followed by thirty MPs, twenty-seven people from the media, ten procurators, and sixteen high-ranking civil servants.³³

TABLE 1
Lustration figures

23,598	Total lustration declarations (1999–present)
6,689	Individuals completed lustration procedure (1999–2001)
278	Positive lustration declarations (1999–2004)
126	Cases filed by Commissioner for the Public Interest with Lustration Court (April 2004)
209	Witnesses interviewed as part of lustration procedure (1999–2001)
103	Lustration Court verdicts (April 30, 2004)
53	Declarations confirmed not true by Lustration Court (May 2002)
20	Declarations confirmed true by Lustration Court (May 2002)
14	Cases discontinued by Lustration Court (May 2002)
48	Verdicts subject to cassation before Supreme Court (April 2004)
25	Verdicts subject to cassation before Supreme Court upheld (April 2004)
11	Verdicts subject to cassation before Supreme Court overturned (April 2004)

The commissioners' reports have contained a number of complaints, the first of which is about the law's impotence.³⁴ Commissioners suggested that unreliable and uncooperative witnesses should be punished according to article 233 of the criminal code, which contains provisions regarding false testimony. The second complaint relates to the need for objective media coverage of lustration activities, as mentioned above. Commissioners suggested that, to this end, the procedure before the Lustration Court should be open and public. The third complaint relates to procedural delays before the court due to absences of persons under review. The lustration law does not equip the court with any legal tool to require the presence of persons being investigated during the hearings, a situation that was abused. Often, individuals would produce medical certificates stating that due to illness they were not able to attend the hearing, while at the same time they were appearing on television to take part in parliamentary deliberations or voting. The fourth complaint is connected to access to archival resources of the former state security institutions. Since 2000 the Ministry of Internal Affairs has been transferring

archival resources to the Institute of National Remembrance. The transfer process has been very slow, and, even after the institute receives the archival materials, it lacks the funds to properly arrange and file them.

The lustration law does not operate in an institutional vacuum. The process is implemented within an institutional setting, which plays an important role and brings with it a number of problems. The first and biggest problem was the impossibility of creating a Lustration Court according to the provisions of the first version of the lustration statute prior to the subsequent amendments. According to the original provision, twenty-one judges for the special Lustration Court would be nominated by the judges' self-governing body, the National Judicial Council, from candidates nominated at meetings of all judges in appellate and *voivodeship* courts. Those nominations had to be made within thirty days of the entry into force of the lustration law. Judges were to be delegated by the minister of justice for four years to the Lustration Court, which was to be located at the Warsaw Appellate Court. However, not enough candidates were nominated within the prescribed time. As the lustration law's immediate aim, which was to establish an institutional structure for the lustration of MP and senatorial candidates before the parliamentary elections of September 21, 1997, was therefore not achieved, critics used this failure to claim that lustration was unnecessary.³⁵ This obstacle was overcome, however, by the June 1998 amendment that created the Lustration Court as a special division of the Warsaw Appellate Court.

One of the most controversial issues connected with the functioning of the lustration law was a decision of the minister of justice/procurator general to fire three procurators who had made positive lustration declarations admitting their collaboration with the secret services. The law itself does not include such a sanction in its provisions. What is penalized is providing a false declaration, not a positive declaration. Nevertheless, the minister of justice/procurator general's decision was based on the idea that the people in question had lost the necessary moral qualification to perform the functions connected with their offices. This was followed by an appeal to the presiding justices of the courts to remove judges who were compromised by collaboration with the communist regime's state security institutions. The appeal provoked a rather negative, if not angry, reaction from the judiciary and lawyers' professional organizations, such as the Association of Polish Lawyers.

Disciplinary sanctions applied by institutions to persons who have made positive lustration declarations are a side effect or, as some claim, an extension of the lustration statute.³⁶ It shows that lustration is sometimes confused with decommunization. Polish law should in some way regulate these types of

cases, either by accepting the application of disciplinary sanctions or strictly forbidding it. The exact scale of this phenomenon is unknown, but appears to be rather small. It could, however, become a larger problem with a change of the political context, for example, if the pro-lustration radical parties receive a bigger say in the public arena.

Cases of judges and procurators were regulated by a statute of December 8, 1998, on disciplinary responsibilities for breaching the independence of the judiciary; all such cases were only in relation to retired judges and procurators. Between 1998 and 2002 the minister for justice started seventy-three procedures against retired judges and seventy-seven against retired procurators.³⁷ On April 17, 1999, the National Advocates' Council adopted a motion stating that collaboration with the secret services between 1944 and 1990 amounted to acts against Polish society and constituted a crucial breach of the moral requirement for the profession. The motion also asked those who had collaborated to leave the profession. Unfortunately, until the lustration procedure comes to an end it is impossible to know how many people are involved. So far, the names of a small number of those who returned positive lustration declarations have been published in *Monitor Polski*. Former members of the profession removed from the list of advocates tried to appeal the decisions before the Constitutional Court, but without success.³⁸

THE LUSTRATION PROCESS IN PUBLIC OPINION

How has the general public perceived the Polish lustration law? After the 1992 dismissal of Olszewski's government because of Maciarewicz's list and its inclusion³⁹ of high-ranking officials such as Lech Wałęsa, lustration became a hot political issue. The next moment of high tension came in 1996, concerning the political use of secret service files, when former Prime Minister Józef Oleksy was accused of being a Soviet spy and was forced to resign from office.

Although polls cannot provide precise measurements of public opinion, they nevertheless can reveal trends. In opinion polls conducted by the Center for Public Opinion Research [*Ośrodek Badania Opinii Publicznej*] (OBOP) in December 1996, 72% of respondents were convinced that many high-ranking officials had previously been informants and collaborators with the secret police; 77% believed that such officials should be removed from office.⁴⁰ According to polls conducted by the OBOP in June 1994 and December 1996, 57% of the population supported lustration. In December 1997 that number rose to 76% and in November 1999 it dropped to 56%. Support for lustration

is strongly correlated with political party affiliation. The largest percentage of lustration opponents is within the SLD (former communist) electorate, while the largest percentage of supporters is within the post-Solidarity, right-wing electorate.

It is interesting to note the trend that the public's opinion of lustration became more negative after the lustration law became operational. In opinion polls conducted each year from 1994 to 2002, support for lustration dropped and negative evaluations increased. In 2002, a decidedly negative opinion was expressed by 31% of respondents and a decidedly positive one by only 33%. The opinion that the lustration law had a bad impact on political life in Poland was expressed by 51%, while only 30% believed that lustration improved political life in Poland.⁴¹ Nevertheless, over the years support for lustration has remained relatively high and surprisingly steady. Over the years, on average more than 50% of the population has supported the lustration law in Poland.

EVALUATION OF THE LUSTRATION LAW IN POLAND

There are different methods of evaluating the lustration law. It seems to me that only one way, based on the realization of the aims of the lustration statute, is justifiable. In other words, the evaluation should be rooted specifically within the Polish context and not based on some abstract, universal criteria. It is commonplace for sociologists of law to argue that the operation or functioning of specific norms and legal institutions depends on the institutional and cultural context. That context in the Polish case, and probably in any other post-communist country, is rather fragile as far as democratic institutional infrastructure and legal culture are concerned. One of the aims of the lustration law was to help to build a democratic and legal culture in post-communist Poland by providing citizens with information about the prior involvement in the operation of the secret services of the communist regime of people aspiring to hold public offices; in this way, the idea was, citizens could make informed choices. The lustration law, by making public knowledge the names of those who confirm their collaboration, frees them from potential political blackmail. It is impossible to measure whether lustration, after only six years in operation, has been able to fulfill this aim. At best, an indirect approach to answering the question can be tried. I will discuss this in the next section on lustration and post-communism in Poland.

From a sociological point of view, the largest group obliged to make lustration declarations have been lawyers — approximately twenty thousand people. The rule of law requires a strong legal profession with strong moral character,

which will guarantee the professional autonomy of law. Yet, despite years of functioning, the lustration process has not had a significant impact upon lawyers. Nevertheless, it may help in the process of transforming the legal profession through at least partial *sanation* (cleansing), as demonstrated by the position, adopted by the self-governing body of the advocates, that advocates compromised by collaboration should make public their involvement, and by the disclosure of the identities of judges compromised by collaboration.

One of the critical factors in determining the effectiveness of lustration, particularly when the aim is to eliminate dangers to the new regime, is timing. The Polish lustration law entered into force very late in the transition because of political struggles. These struggles made lustration more politically charged, or connected with political processes. At the same time lustration lost its teeth while, paradoxically, public expectations grew higher.

One of the positive outcomes of the lustration law's late arrival is its "softness." In comparison to the harsh Czech approach, lustration in Poland is not focused on revenge or the elimination of certain groups of people from power. It is focused on the penalization of lies. All necessary elements of the rule of law, such as presumption of innocence, broad rights of the defendant, and proper court procedure, are observed. This makes the Polish lustration process as civilized as possible. It is true that this civility could be improved by distancing the process from political abuse, speeding up the procedure before the Lustration Court, and providing objective coverage in the media. Nevertheless, the very existence of the lustration law and the institutions it created eliminated wild lustration and provided wrongly accused persons with a legal tool for their defense outside of the normal procedure for defamation.

The lustration law sought to clean up the public sphere, which requires transparency. Procedures before the Lustration Court should in turn be more open to the public. The secrecy of the procedures has not contributed to the realization of the aims of the law. Despite the fact that classified material was used, the openness of the procedure could be improved.

The lustration law was too often changed as an outcome of political processes, which destabilized the lustration process. It is true that the first statute was not an example of "legislative art" and amendments were necessary, but some of the subsequent changes, made after the last election won by SLD, were introduced purely for political reasons. A good example of this is the manipulation of the definition of "collaboration," as described above.

The lustration laws in post-communist countries do not serve the same function as security clearances in liberal democracies. Lustration is one of the legal devices for dealing with the past, alongside other procedures such

as decommunization, restitution of property, and trials for perpetrators of crimes committed under the communist regime for political reasons. All these legal tools should be analyzed together, but such a task is beyond the scope of this chapter. In the final section, however, I will discuss the lustration process in Poland within the broader context of post-communist efforts to deal with the past.

THE LUSTRATION LAW AND POST-COMMUNISM

What I have offered hitherto is an analysis that focuses on the legal and socio-legal dimensions of the Polish lustration law. Here I want to discuss the law from the point of view of social theory. The problem is that so far we do not have a satisfactory social theory of post-communism. That is why I will try to sketch the relationship between lustration and other strategies for dealing with the communist past in Poland after 1989.

All transitional justice projects presuppose some sort of social theory usually not very far removed from Durkheim's concept of law as an expression of mechanical solidarity, as values shared by members of a society. Law is an expression of the moral matrix of society; in effect, law defends the type of social relations that are most valuable for the society. A post-Durkheimian perspective adds the assumption that legal institutions could infuse society with some of the values necessary for democracy and the rule of law. This assumption treats post-communist societies as in a transitional phase from point A to point B, where point B is a fully developed liberal-democratic society with all the necessary institutions and values. Lustration, decommunization, and restitution of property are legal mechanisms for the realization of that aim.

I prefer to use the term *transformation*, rather than *transition*, to describe the social processes after the collapse of communism. This allows us to look at the specificity of the new institutions developed, trace the elements of the new social and institutional structure, and stress the role of those institutions in building something new. I will adopt this approach to these extraordinary processes in my analysis of the sociopolitical context of the Polish lustration law.

The initial problem is the past, especially the communist past, with which all post-communist countries are obliged to cope. All have developed institutions that allow them to do this. Those institutions are supposed to address local issues. Dealing with the past sounds like a universal problem, but behind it are always particularities—local settings, relations, and structures. The local

dimensions of policies dealing with the past were and are different, but it is possible to identify some similarities due to a common denominator—these are not policies to deal with just any past but with a specific past, namely, the legacies of communist regimes.

The case of the Polish lustration law is as specific as any other, but it is also puzzling. Some may find it puzzling that the country that led the dismantling of communism was the last to adopt a lustration law and that it adopted such a “soft” one. How do we explain that in the country in which there was an anti-communist organization (Solidarity) with ten million members—which was then suppressed by martial law imposed by General Wojciech Jaruzelski on December 13, 1981—the new political forces did not implement any decommunization measure? How do we explain the fact that a few years after the transfer of power, a post-communist party won a majority in an election? How do we explain that a former apparatchik and secretary of the Central Committee of the Communist Party won a presidential election against the legendary leader of Solidarity, Lech Wałęsa?

These are the most visible puzzles from political life; there are also questions regarding other dimensions, such as economic life. Where have the multimillionaires come from? How were they able to concentrate ownership of state property so quickly? What is their political genealogy? And there are questions regarding the moral dimension of social life. Why is public morality at such a low level in a society that not long ago generated a mass social movement such as Solidarity? How do we explain the erosion of the prestige of public authorities? Why did the majority of society not participate in the last democratic elections? Why is corruption so widespread?

These are important questions, but, one may ask, what do they have to do with lustration? Although it is impossible to connect lustration to everything that has gone wrong since 1989, lustration or its lack is very much connected to the project of building a new type of society and polity. In other words, I propose to look at lustration as a *constitutional* issue, as part of a broad spectrum of policies and legal strategies for “settling accounts with the past,” as part of the creation of the constitution of the new society.

Efforts to deal with the past are not unique to Central and Eastern Europe. It is true that the past haunts this part of the world, due to its complicated history, and most recently its communist history. As mentioned above, it is puzzling that while all post-communist societies sooner or later were forced to face their communist past, lustration and decommunization measures were the “softest,” in terms of sanctions, in the countries that first broke with communism: Poland and Hungary. One hypothesis is that because of the relatively

large proportion of both nations' populations engaged in the anti-communist opposition, in comparison to other countries such as Czechoslovakia, there was no need to provide additional legitimacy for the new political elites.

Lustration and decommunization in Poland became an issue when a real struggle began for the future social and institutional structure of the country. This shows that, contrary to the dominant perception, lustration and decommunization are not backward looking but forward looking. It also shows that lustration and decommunization were and are part of the political process and political struggle. The peculiar character of the post-communist "negotiated revolution," using the term coined by Laszlo Bruszt, when all elements of social life undergo radical change at the same time, represents a type of transformation in which dealing with the past cannot be reduced to the question of what to do about the "hangman." The very problem of dealing with the past in post-communist societies is not only about responding to gross violations of human rights through retributive justice, compensation and restitution of property, and truth telling. Lustration and decommunization became legal tools in the rearrangement of the constitutional setting of society and state. In the Polish case the lustration law became the main tool in the political struggle because other avenues, such as decommunization, were blocked. Lustration became a part of the pursuit of historical justice, but more importantly part of the struggle over social justice, over the criteria and rules of redistribution of the national product and national assets, when the losers in the economic transformation, who not long before comprised the main force in fighting against communism, discovered that the major beneficiaries of the transformation were former *nomenklatura* and members of security apparatuses.

Before 1989 there was no articulation of any ideas regarding decommunization or other ways of dealing with the functionaries of the communist regime. Generally there were two groups with positions on the matter:

- radicals, who believed that the collapse of communism would result from some sort of revolution and/or war and the problem would be solved by revolutionary justice; and
- evolutionists, who believed in the evolution of the communist system towards the incorporation of human rights and limited autonomy with preservation of the dominant position of the Communist Party. In this stream of political thought, there was no room even to entertain the idea of dealing with the past.

The peculiar type of exit from communism in Poland, first through round-table talks and then the partly free election on June 4, 1989, revealed that even

the communists were not conscious of the issue. They did not demand “sunset clauses” or general amnesty. They did not take charge of and destroy the files, as was the case in Chile where the archives of the special forces were destroyed in order to make it impossible to hold functionaries accountable before the courts in the future.

The so-called contract parliament, elected on June 4 and 18, 1989 (in two rounds of voting), established an Extraordinary Parliamentary Commission headed by the young deputy from the former anti-communist opposition, Jan Maria Rokita, to examine the activity of the Ministry of Internal Affairs.⁴² The aim of Rokita’s commission was to investigate the deaths of almost one hundred people who died in unexplained circumstances but always in the context of the activity of secret services or communist militia during the 1980s. Nearly at the same time, another Extraordinary Parliamentary Commission was established to deal with the decision on October 30, 1988, of the last prime minister of the communist regime, Mieczysław Rakowski, to declare the bankruptcy of the Gdansk shipyard, which was the cradle of the Solidarity movement. It is possible to treat the work of this commission as a first step in settling accounts for the economic catastrophe of the communist regime in Poland.

After a celebrated article penned by Adam Michnik, entitled “*Wasz prezydent, nasz premier*” (Your president, our prime minister), a domino effect began. First came the creation of Tadeusz Mazowiecki’s government, but with two important portfolios (internal affairs and defense) reserved for President General Wojciech Jaruzelski’s people. Despite a relatively fast departure from agreements achieved at the round-table talks (visible in the very act of creating a government that did not include the communist party), progress in decommunization has been very slow.

Another attempt at decommunization was the government’s effort to determine the legal status of the property belonging to the Polish United Worker’s Party (Communist Party). Weeks after the establishment of the commission the party dismantled itself. The disappearance of one of the two parties to the agreement achieved at the round-table talks accelerated political change in the country. This does not mean, however, that Mazowiecki’s government, which accepted a “thick-line” policy separating the past from the present,⁴³ was active in the process of decommunization. The government was preoccupied with the economy, inflation, and foreign policy. At the same time, the opposition movement started to fragment. Decommunization was taken up by the Center Alliance [*Porozumienie Centrum*], organized by Jarosław Kaczyński. One of the more interesting decommunization ideas circulated at

this time of economic misery and high inflation in Poland was to impose a special levy on all members of the former Communist Party.

On March 20, 1990, the government established a committee to examine the archives of the Ministry for Internal Affairs. It was a reaction to information in the media that some files in the archives were being destroyed by the secret services. The establishment of the committee was not part of any holistic concept of preservation of the legacy of the security apparatus, however, but a response to the media's claim. The still-dominant part of the new ruling elite did not perceive the issue of dealing with the past.

In July 1990 a supplementary inquiry began regarding the brutal murder of Reverend Jerzy Popiełuszko by SB officers on October 19, 1984, near Toruń. Then, in September of the same year, the prosecutor's office of the armed forces began an inquiry into the massacre of workers in Gdańsk in December 1970. On November 9, 1990, the Parliament, by a small majority of 167 votes to 120, adopted a law on the assumption of the property of the former Communist Party by the state treasury. As a symbolic act, one week later the building that had housed the Central Committee of the Communist Party was turned into bank offices, and became the location of the Warsaw stock exchange.

Despite this accelerated political change, manifested by the dismissal on July 6, 1990, of two close associates of President Jaruzelski — General Florian Siwicki as minister of defense and General Czesław Kiszczak as minister of internal affairs — and the subsequent resignation of General Jaruzelski from the office of the president, decommunization policies and legislative activities progressed very slowly. This was not because of the government alone; public opinion was deeply divided over the issue. According to a public opinion survey conducted in November 1990, 42% of respondents supported a ban on former communists holding public office, while 45.5% were against such policies. In September 1991, 52% of respondents were against depriving the former communists of the right to hold public office. It appears that at the beginning of the period of economic austerity, a significant part of Polish society supported the presence of communists in the new democratic polity.

An important measure of historical retributive justice came in the form of a statute of April 4, 1991, which established "Stalinist crimes" as crimes committed between 1939 and 1956 against ethnic Poles or against Polish citizens of other ethnic origin. Stalinist crimes were not subject to the statute of limitations. The same statute also established the main Commission for Inquiry into Crimes against the Polish Nation, based on the former Commission for Inquiry into Nazi Crimes, which stimulated new inquiries. Between 1991 and 1995 the commission initiated 950 new inquiries and completed 620. Despite

the large number of inquiries, however, the courts received a very small number of indictments. Prosecution was often abandoned for lack of satisfactory documents and the impossibility of identifying perpetrators. If the trials actually started, they were prolonged, to the frustration of former victims. For instance, the trial of a high-ranking official in the Ministry of Public Security between 1945 and 1954, Colonel Adam Humer, and his colleagues accused of torture, only ended with a verdict at first instance after nearly three years (September 1993 to March 1996). So far approximately twenty verdicts have been reached.

A statute of February 23, 1991, focused on victims and annulled verdicts passed between 1944 and 1956 for activity aimed at the independence of the Polish state. This statute contained provisions for compensation for victims of communist crimes. On August 25, 1998, another statute denied pension privileges to judges and prosecutors who, between 1944 and 1956, were functionaries of the apparatus of repression, that is, worked in the military administration of justice, secret court divisions, or so-called ad hoc courts.

It has been, and to some extent remains, nearly impossible to apply criminal justice in relation to crimes committed by communist state functionaries after 1956, which do not fall into the category of Stalinist crimes. Trials in such cases became possible with the adoption of the legal provision that the statute of limitations for crimes committed by public functionaries prior to December 31, 1989, started on January 1, 1990. An additional statute of May 31, 1996, forbidding the application of amnesties granted by the communist People's Republic of Poland for functionaries who committed crimes, eliminated any doubts about the legal status of those crimes.

From the point of view of public opinion, however, these trials have been very long and extremely slow. For instance, in the case of the members of the Motorized Detachment of the Civic Militia [*Zmotoryzowane Odwoły Milicji Obywatelskiej*] (ZOMO) platoon, who took part in pacification of the Wujek coal mine in which striking miners were killed, an indictment was filed with the court in December 1992, fourteen months after the inquiry was closed. In November 1997, six years after the beginning of the trial, the court found the former functionaries not guilty. But this was not the end of the procedure; there were appeals and the Supreme Court sent the matter back to the lower court. The trials are still continuing.⁴⁴ A sort of breakthrough occurred when the former minister of internal affairs, General Czesław Kiszczak, was found responsible on March 17, 2004, for the deaths of the miners. It was the first time that a high functionary of the communist state was found guilty and sentenced by the court.

Similarly, the inquiry into the case of the massacres in December 1970 in Gdańsk began in October 1990, but an indictment was not filed with the court until April 1995, and the trials started three years later due to the absence of the accused. It is still ongoing.

A special case concerns the issue of the responsibility of General Wojciech Jaruzelski for the implementation of martial law on December 13, 1981. Despite the fact that Parliament declared the implementation of martial law illegal, the procedure against General Jaruzelski before the parliamentary Committee for Constitutional Responsibility was discontinued on February 13, 1996, after four years of procedure. In April 2006 the prosecutor's office presented charges against General Jaruzelski in connection with this matter.

At the same time, the self-purification of state institutions was very slow and minimal. With the reorganization of the Ministry of Internal Affairs and dismantling of the SB, fourteen thousand out of twenty-four thousand functionaries decided to undergo the verification procedure [*weryfikacja*], or vetting procedure, required for readmission to the services⁴⁵ (ten thousand decided not to apply). Ten thousand applicants qualified for further employment, and about four thousand became functionaries in the new State Security Office [*Urząd Ochrony Państwa*] (UOP). The procedure was carried out by qualification commissions, which were mandated to disqualify applicants who, as functionaries of former intelligence or counterintelligence services in the previous regime, had violated the law or the human rights or dignity of other persons, or had used their position for private gain.

The qualification commissions operated at the *voivodeship* level and at the central state level as appeals commissions. They were comprised of MPs, senators, lawyers and representatives from police headquarters, members of the Solidarity trade union, and other trustworthy citizens. Criticism of the verification procedure came mainly from the former Communist Party in the Sejm. The commissioner for citizens' rights (ombudsman) at the time, Ewa Łętowska, also criticized the procedure for violating the human rights of the former functionaries.⁴⁶ After the completion of the verification procedure, two-thirds of the operational staff of the newly established UOP came from the pre-1989 Ministry of Internal Affairs. Many of the disqualified former secret services operatives found employment in regular police forces and private security agencies.

Regular police forces and military intelligence were not subjected to the verification procedure. Military intelligence was reorganized and reduced in size, but the entire process was not subject to any external control.

Verification of public prosecutors was based on the evaluation of their declarations of professional qualifications and activities. If the Ministry of Justice found the declaration to be false, the prosecutor was not reappointed. In 1990, 10% of public prosecutors, that is 341 people, lost their jobs as a result of national verification. In the office of the general prosecutor, 33% of the staff lost their jobs.⁴⁷ The process itself was quick and effective, but was criticized by the post-communist party for breaching the rule of law. Following complaints made to the commissioner for citizens' rights concerning the lack of an appeals mechanism, the Ministry of Justice set up a commission to review appeals; it overturned decisions in forty-eight cases.

There is also the issue of access to secret police files. In 1992 Germany became the first former communist country to open up secret police files to citizens. Other post-communist countries followed and passed similar legislation, such as Hungary in 1994 and Bulgaria in 1998. This was not possible everywhere, however, from an economic and organizational point of view. In Poland the issue was discussed only in 1997 in connection with a presidential lustration law project in which it was suggested that a civic archive be established within the framework of the state archives. In the wake of the September 1997 election, this idea was absorbed into the Law on the Institute of National Remembrance [*Ustawa o Instytucie Pamięci Narodowej*], which was introduced in July 2000. The law regulates access of interested persons to information collected about them by the secret services between 1944 and 1989. In an opinion poll conducted in December 1997, 73% of respondents supported the view that each citizen should have access to his/her file, and 11% supported the opposite opinion. Many interested citizens will not find a file on themselves because the archives of the Office for the Protection of the State and then the Ministry of Internal Affairs and Administration preserved only about three million files on citizens. The Law on the Institute for National Remembrance granted the prosecutor of the institute the same procedural rights as public prosecutors. The institute started work on the communist period in Poland and has begun to play an important role in the lustration process due to the fact that all files are in its archives.

In this broad context of decommunization, lustration plays a peculiar and crucial role. It can be said that transformation itself is decommunization. This is true, but with the reservation that the post-communist structure is still in the process of solidifying itself, and the networks of communist connections influence public life mainly through their impact on the design and operation of the new institutions. In this way, the interests of the former *nomenklatura*

networks become embedded in the new political setting. This is why in the Polish case lustration was and is a battlefield. Post-communist forces supported it, but presented it as a normal clearance procedure as would exist in any democratic country. Anti-communists saw it as a limited tool for undermining a post-communist structure still controlled by the former *nomenklatura* and secret services.

Since the parliamentary and presidential elections in November 2004, there has been talk about broadening the scope of lustration to include other professional groups, such as academics, as well as simplifying the procedure. One development is a new process of scrutiny within the Catholic Church in Poland—based on a *sui generis* lustration procedure. With the victory of pro-lustration political parties and declarations by the new government that it wants to change the law in order to broaden the process, it looks as if the lustration odyssey is not finished yet, sixteen years after the beginning of the transformation.

NOTES

- 1 See the final section of this chapter.
- 2 Wojciech Sadurski reconstructed the meaning of both categories in political discourse in Central and Eastern European post-communist countries. He wrote “‘lustration’ applies to the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus), while ‘decommunisation’ refers to the exclusion of certain categories of ex-Communist officials from the right to run for, and occupy, certain public positions in the new system. However, in the public debate on the moral and legal rationales for and against the policies covered by these concepts, the two have been often lumped together.” Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), 245. For further analysis of the decommunization issue in Poland, see Bronisław Wildstein, *Dekomunizacja której nie było* (Kraków: Ośrodek Myśli Politycznej i Księgarnia Akademicka, 2000).
- 3 The description of a political party as “post-communist” means that it existed in and was part of the communist political system. A general typology within the Polish party system is a division between post-communist parties and post-Solidarity parties. The two main post-communist parties were the Democratic Left Alliance [*Sojusz Lewicy Demokratycznej*] and the Polish Country Party [*Polskie Stronnictwo Ludowe*].
- 4 For a detailed history of the debate about the lustration issue in Poland, see the recently published book by Piotr Grzelak, *Wojna o lustracje* (War around lustration) (Warszawa: Trio, 2005). For an overview of the main points of not only lustration but “dealing with the past” in Poland, see Noel Calhoun, *Dilemmas of Justice in Eastern Europe’s Democratic Transition* (New York: Palgrave, 2004), 92–131; on lustration, see 104–6 and 122–20.
- 5 For an example of the role of secret services in the communist society, see Ewa Matkowska, *System. Obywatel NRD pod nadzorem tajnych służb* (Kraków: Arcana, 2003).
- 6 Józef Oleksy, when he was prime minister, was accused by Mielczanowski, at the time the minister of internal affairs, of being an agent for the Soviet Union’s intelligence.
- 7 For more on the history of that department, with a staff of nineteen people led by twenty-six-year-old Piotr Woyciechowski, see Michał Grocki, *Konfidenci są wśród nas...* (Warszawa: Editions Spotkania, 1993).
- 8 For a history of this drama in context, see Antoni Dudek, *Pierwsze lata III RP 1989–2001* (Kraków: Wydawnictwo Arcana, 2002), 257–69.
- 9 After 1989 unified oppositional forces fragmented into many political parties and movements. Parties that arose from the opposition and Solidarity are usually referred to as being post-Solidarity. This does not mean that post-Solidarity parties share the same ideology. They share only the same genealogy. Two liberal post-Solidarity

parties were the Democratic Union [*Unia Demokratyczna*], under the leadership of Tadeusz Mazowiecki and with distinguished members such as Jacek Kuroń, Adam Michnik, and Bronisław Geremek; and, liberal in the economic sense, the Liberal-Democratic Congress [*Kongres Liberalno-Demokratyczny*]. The differences were in policies but were mainly generational. The Liberal-Democratic Congress was founded by a different generation of anti-communist opposition.

- 10 For a fuller presentation of this position and an overview of the arguments, see Andrzej Zybertowicz, *W uścisku tajnych służb. Upadek komunizmu i układ postnomenklaturowy* (Warszawa: Wydawnictwo Antyk, 1993); see also Maria Łoś and Andrzej Zybertowicz, *Privatising the Police-State: the Case of Poland* (London, New York: Palgrave, 2000).
- 11 Decision U.6/92 of June 19, 1992. For a description of context and comments, see Sadurski, *Rights Before Courts*, 244.
- 12 Jan Olszewski was a lawyer and prominent member of the opposition movement. He became prime minister after the 1991 election. His government was composed of right-of-center parties, used strong anti-communist rhetoric, and promoted decommunization. Olszewski's government was from the very beginning in conflict with President Lech Wałęsa. Wałęsa dismissed Olszewski's government after the release of the so-called Maciarewicz list, on which Wałęsa's name was mentioned.
- 13 For an analysis of techniques used in the media to compromise lustration, see Radosław Sojak, "Demaskowani i wykluczeni. Dyskurs antylustracyjny w Polsce w świetle socjologii wiedzy," *Terazniejszość Człowiek Edukacja*, no. 2 (1998): 29–59.
- 14 See Annna Potocka-Hoser, "Spor o lustracje — komunikacja bez porozumienia," *Kultura i Społeczeństwo*, no. 2 (1996): 163–182, 178.
- 15 For an overview of the main features of the four drafts, see the table on pages 199 and 200 in Ewa Bieniek, "Lustracja w krajach Europy Środkowo-Wschodniej," in *Zagadnienia konstytucjonalizmu krajów Europy Środkowo-Wschodniej*, ed. Tadeusz Mołdawa (Warszawa: Elipsa, 2003).
- 16 Before his successful presidential election, Kwaśniewski was a leader of the post-communist party and before 1989 he was one of the secretaries of the Central Committee of the Polish Communist Party [*Polska Zjednoczona Partia Robotnicza*] (PZPR).
- 17 Decision of the Constitutional Tribunal of October 21, 1998 [*Wyrok Trybunału Konstytucyjnego z dnia 21 października 1998 r.*] and Decision of the Constitutional Tribunal of November 10, 1998 [*Wyrok Trybunału Konstytucyjnego z dnia 10 listopada 1998 r.*], *Przegląd Sejmowy*, nr 6 (1988), 172.
- 18 The minority opinion criticized the amendment and wanted to invalidate the clause on substantive not procedural grounds. For instance, the president of the Constitutional Tribunal, Marek Safjan, argued in his dissenting opinion that the exemption of those who did not endanger other people's rights and freedoms would introduce highly

- vague and subjective criteria into the definition of collaboration that would lead to inequality of treatment of the accused in the lustration procedure.
- 19 Cassation is a form of appeal. In the Polish lustration law there is a provision for normal appeal to the higher Lustration Court and then in the form of cassation to the Supreme Court.
 - 20 See comments in *Ius et Lex* 1, no. 2 (2003): 489–520.
 - 21 *Wojewoda* in Polish is a state administrator of the administrative unit of the state, *województwo* (province).
 - 22 Decision K.39/07, *Orzecznictwo Trybunału Konstytucyjnego* at 518–19.
 - 23 For an interpretation of the concept of public law, see Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004).
 - 24 Bogusław Nizieński, commissioner for the public interest, interview by author, conducted in his office, Warsaw, Poland, November 20, 2002.
 - 25 For the order of positions see article 7 of the lustration law at <http://www.rzecznihip.gov.pl/pprawna.htm>.
 - 26 Krzysztof Kauba and Bogusław Nizieński, “Lustracja,” in *Ius et Lex. Księga Jubileuszowa ku czci Profesora Adama Strzembosza*, ed. Antoni Dębiński, Alicja Grześkowiak and Krzysztof Wiak (Lublin: Wydawnictwo KUL, 2002), 347.
 - 27 *Ibid.*
 - 28 Actually 25,453 lustration declarations were filed but 1,855 came from retired procurators and judges who were not obliged to do so.
 - 29 The latest figures available are from May 2004; see Bogusław Nizieński, “Polski model lustracji” (paper delivered at the conference “Cienie państwa policyjnego, wokół teczek bezpieki” at Nicolaus Copernicus University, Toruń, Poland, May 4, 2004) (on file with author).
 - 30 Statement of the Commissioner for Public Interest, Session 21 of the Sejm of the Polish Republic, May 10, 2002 [*Wystąpienie Rzecznika Interesu Publicznego Bogusława Nizieńskiego na 21 posiedzeniu Sejmu Rzeczypospolitej Polskiej w dniu 10 maja 2002*] (on file with author).
 - 31 All this information is in the report delivered by the commissioner to Parliament. No more recent data had been published by the commissioner’s office at the time of writing.
 - 32 See Kauba and Nizieński, “Lustracja,” 348.
 - 33 All data from “Excerpts from the information about activities of the Commissioner for Public Interest in 2001, sent on February 19, 2002 to the President of Polish Republic, Sejm, Senate, Prime Minister, and Chief Justice of the Supreme Court” [*Wyciąg z Informacji o działalności rzecznika Interesu Publicznego w 2001 r. Przesłanej w dniu 19 lutego 2002 do Prezydenta RP, Sejmu, Senatu, Prezesa Rady Ministrów oraz do I Prezesa Sądu Najwyższego*] (on file with author). The largest number of cases was at the beginning of the lustration procedure according to the provisions in the lustration law. After that only newcomers

- to public life, limited in number, were obliged to make a lustration declaration.
- 34 Kauba and Niziński, "Lustracja," 345–49.
- 35 See article written during the stalemate by Leszek M. Hudala, "Ustawa Lustracyjna — i co dalej?," *Studia Iuridica* 35 (1998): 171–91.
- 36 See Wojciech Sadurski, "Ustawa lustracyjna uzupełniona," *Rzeczpospolita*, March 5, 1999.
- 37 For problems with dealing with past in the Polish system of the administration of justice, see Maria Stanowska, "Próby rozliczenia z przeszłością w wymiarze sprawiedliwości," in *Ius et Lex. Księga Jubileuszowa ku czci Profesora Adama Strzembosza*, ed. Antoni Dębiński, Alicja Grześkowiak and Krzysztof Wiak (Lublin: Wydawnictwo KUL, 2002), 301–37.
- 38 See Constitutional Tribunal ruling of May 20, 2002 (SK28/01).
- 39 See the history of lustration above.
- 40 *Gazeta Wyborcza*, February 3, 1997.
- 41 See summary information of the research under Komunikaty, Public Opinion Research Center (CBOS).
- 42 See Jan Rokita, *Raport Rokity. Sprawozdanie Sejmowej Komisji Nadzwyczajnej do Zbadania Działalności MSW* (Kraków: Arkana, 2005).
- 43 Mazowiecki, the first non-communist prime minister in the former communist world, in his first speech to Parliament, used the expression *gruba kreska* (thick line) to separate the communist past from the post-communist present and future. The expression became synonymous with a policy of abandoning the attempt to make the former communist ruling elite accountable for the excesses of the communist regime.
- 44 "Historia Wujka i procesu," *Gazeta Wyborcza*, March 17, 2004.
- 45 Maria Łoś, "Lustration and Truth Claims: Unfinished Revolution in Central Europe," *Law and Social Inquiry* 20, no. 1 (Winter 1995): 122–23.
- 46 For information see "Vetting of the SB cadres," in Łoś and Zybertowicz, *Privatising the Police-State*, 127–28.
- 47 Stanisław Podemski, "Lustracja zlustrowana," *Polityka*, September 13, 1997, 17.

CHAPTER 7

Lustration as Political Competition:
Vetting in Hungary

Elizabeth Barrett, Péter Hack, and Ágnes Munkácsi

VETTING LEGISLATION AND CONTEXT

HISTORICAL AND POLITICAL CONTEXT

There is no record of vetting, or lustration,¹ having been explicitly considered during the round table talks in 1989 at which Hungary's transition from a communist regime to a democratic system was negotiated. Although Gyula Horn, prime minister during 1994–98, would claim that the 1990 lustration bill violated a “gentlemen's agreement” reached during the negotiations to the effect that there would be no persecution of communist-era figures, there is no evidence to support his claim and many other participants in the talks denied that there had been such a deal. Rather, Brigid Fowler suggests that:

historical justice might be seen as having fallen through a gap left in the mechanisms and politics of Hungary's immediate transition: it was too large an issue, too clearly demanding of democratic legitimacy to be settled via elite pact while the transition itself was still in doubt; but it was too small and time-specific to be regulated explicitly in the new republic's protected basic laws.²

Lustration was not a very prominent issue around the time of the transition or indeed in later years. Nevertheless, some specific incidents raised early fears about the security services and their possible continued influence in the new system:

- In late 1989, a secret police officer told the Hungarian opposition that some opposition figures were still under surveillance, despite institutional reforms that should have prohibited such activity. At the same time, it emerged that huge numbers of security service files had been deliberately destroyed.³ This became known as the “Danubegate” scandal and was a major factor in motivating both the public and the opposition political parties—the Alliance of Free Democrats [*Szabad*

Demokratak Szovetsege] (SZDSZ) in particular—to demand that the role of the secret services be curbed.

- In fall 1990, the interior minister revealed to the Parliament's National Security Committee that a list existed comprising former secret police informers, and that several current MPs were on it. This sparked concerns about the moral probity and potential vulnerability to blackmail of contemporary politicians.

Hence, the first calls for lustration arose in response to fears that the communist state's security services retained influence even under the new democratic system, and that the existence of documents and files relating to the agent network and security services operations during the communist era might disrupt the functioning of the new democratic system. The motivation for lustration in Hungary was thus initially to prevent blackmail and other abuses in contemporary politics. Only later, post-1995, did the debate become more concerned with a general moral cleansing.

Claus Offe⁴ has distinguished between “backward-looking justice” and “forward-looking justification” as two motivations for lustration. The latter category is concerned more with ensuring that the legacy of the past does not disrupt democracy in the future.⁵ In Offe's model, both of the major factors creating a demand for lustration in Hungary—at least at the elite level—were essentially forward looking and aimed at ensuring the healthy functioning of the new democracy.

By contrast, much of the literature on lustration in Central and Eastern Europe focuses on backward-looking explanations. Two main models are put forward:

- (1) One model, proposed by John P. Moran,⁶ argues that the conduct of the communist regime, in particular its attitude towards dissent, explains the strength of post-transition demands for lustration. If a communist regime strongly suppressed dissent, the model postulates that there will be greater pressure from the public for lustration—as a kind of release mechanism or a way of “settling scores.” On the basis of this model, Moran predicted that Hungary, having had a relatively moderate (post-1956) communist regime under János Kádár,⁷ was less likely to engage in lustration or to pursue lustration energetically than, for example, Czechoslovakia or East Germany, where repression had been more forceful.
- (2) The other main model, outlined by Samuel Huntington,⁸ argues that the way in which the transition from democracy occurred is the

primary variable affecting subsequent lustration efforts. If the non-democratic regime handed over power peacefully and as a result of calm negotiations or bargaining among the old and new elites, the model predicts a lower likelihood of subsequent lustration. If by contrast the nondemocratic regime's exit had to be forced, lustration activity is expected to be more likely and more intense. Huntington predicted that Hungary would not pursue transitional justice; and indeed that only Romania and East Germany would.

Both models imply an understanding of lustration as a form of "punishment" for members of the old regime seen to have transgressed a moral law, rather than as a way of establishing a clean slate for the future.

A further model, put forward by Helga A. Welsh,⁹ is the first to consider the politics of the present as an important factor. She draws attention to the process of creating the legislation, giving proper significance to the fact that the post-transition elite plays a critical role in shaping the lustration debate and the legislation that eventually emerges. Welsh is concerned mainly with the level of turnover of the elite, that is, whether the Communist Party or its successor remained in power—or in an influential political position—after the first democratic elections. In this way, Welsh's analysis complements those of Moran and Huntington, since the interests of the post-transition elite are partly determined by the character of the former regime and the way in which it handed over power.

According to Welsh, two conditions are necessary for a radical and enthusiastic pursuit of lustration: refusal by an orthodox communist regime to bargain with the opposition until faced with mass protests; and the communists' loss of influence in the early post-transition period. Given that the transfer of power in Hungary was peaceful and negotiated and that the socialists then lost power and became the official opposition in the first Parliament, Welsh would not expect early or vigorous attempts to pursue lustration in Hungary. It is arguable whether or not this fits the reality: while demands for a lustration law did occur both in 1990 and consistently over the following years, the passage of a law was significantly delayed until the end of the first Parliament in 1994 and lustration was thereafter implemented in a rather patchy and reluctant manner.

In defense of Welsh, one might question whether there was really full elite turnover in Hungary. Although the first elected government did not include the Socialist Party [*Magyar Szocialista Párt*] (MSZP) but rather comprised three other parties—the Hungarian Democratic Forum [*Magyar Demokrata Fórum*] (MDF), the Christian Democrats [*Kereszténydemokrata Néppárt*] (KNDP), and

the Independent Smallholders [*Független Kisgazdapárt*] (FKGP) — there has been much speculation and a certain amount of evidence to suggest that significant numbers of these parties' MPs had worked as secret agents for the former regime. Hence, while the communists lost influence in Hungary, persons likely to be personally affected by lustration laws did continue to occupy critical positions of political influence. It is thus possible that the existence of vested interests in the government militated against the passage of a robust lustration law. This may explain why Hungary's first post-transition prime minister, József Antall (MDF), adopted a strategy of "promising but not delivering lustration."¹⁰ The communist-successor party, the MSZP, was also similarly reluctant to lustrate for obvious reasons.

Welsh argued that over time the issue of lustration could become politicized such that accusations of a "less than honorable" past would be used as a political tool in the competition for power. This has indeed been the case in Hungary, and partly accounts for the fact that lustration remained a relatively high-profile issue even fourteen years after the transition began. Moreover, the fear of such abuses was a key motive for drafting the first Hungarian lustration law.

Kieran Williams, Aleks Szczerbiak, and Brigid Fowler¹¹ build on Welsh's model to explore in what circumstances lustration is instrumentalized as part of the political game and to consider the motives and tactics of the advocates of lustration, in order to explain how political competition affects the process. They suggest other present and future-oriented factors that help to explain the emergence and consistent renewal of demands for lustration. Central to their explanation is an account of the transformation of the political Right in Central and Eastern Europe during the post-transition period. The Right has in many countries, and certainly in Hungary, gradually redefined its identity—largely as a response to the fact that former communists did not disappear from the political arena but rather managed to remain as viable competitors for power. In Hungary, by 1998, anticommunist rhetoric was a key factor in the election campaign of the right-wing Fidesz-Hungarian Civic Party [*Fidesz–Magyar Polgári Párt*] (Fidesz–MPP) and apparently an important reason for its electoral victory. Fidesz subsequently extended the reach of the lustration law while in government in 2000, and has consistently employed anticommunist rhetoric in criticizing its main rival, the MSZP.

Williams et al. also show that attitudes towards lustration across Central Europe in recent years have been shaped largely by the policy on lustration in the early years of the post-transition period; that is, that views of lustration are formed partly in reaction to the experience of lustration. Thus, in the mid-

1990s some right-wing advocates of lustration in Hungary sought to attribute the Czech Republic's apparent post-transition success to its thorough lustration policy. Within Hungary, FKGP calls for its own members' lustration and later for a lustration law may have reflected a perceived need to avert suspicion aroused by rumors about the past of its own party leaders and parliamentarians. Such rumors were facilitated by the absence of a thorough lustration in the early years, which might have ensured that nobody then active in Parliament could have had a secret past.

In addition, public opinion surveys suggest that there has been a consistent demand for some kind of lustration policy from the Hungarian population. Indeed, over the period 1992–2002, around 50% of the population supported the publication of information about former secret agents.¹² Since the lustration law that was adopted has in most cases not led to public disclosure, this raises questions about the extent to which it has served the public interest.

Williams et al. point out that none of these factors is much related to the nature of the preceding communist regime or the nature of exit from it. Rather, they argue that in Hungary “security and transparency concerns among some liberals, and the pursuit of an anti-Communist agenda by malcontents on the radical right” were the main factors generating pressures for a lustration law after 1990.¹³

The question of why Hungary chose to introduce lustration rather than another form of transitional justice—criminal prosecution, amnesty, or a truth commission, for example—is tackled by Cynthia M. Horne and Margaret Levi. They argue that in Central and Eastern Europe, the fact that such a large proportion of the population was involved with the communist security services makes it “difficult to assess blame.”¹⁴ Put more bluntly, this would presumably also reduce overall willingness to punish involvement. However, it is not clear whether a large proportion of the population was indeed involved or whether this is a myth. Perhaps more relevant is the spread of informers throughout different social groups, meaning that there is no one cohesive group with an ax to grind against the other, as has been more clearly the case in countries where ethnicity or race have been factors, for example, South Africa.

Perhaps the most interesting and ironic reason offered by Horne and Levi for the adoption of lustration in Central and Eastern Europe is their argument of path dependency—that is, “purging” those disloyal to the Communist Party was commonplace throughout the Soviet Union and Eastern Europe. Indeed, the Czech word “lustrace” was used by the Czech secret police for conducting

checks on citizens' loyalty to the Communist Party. In this explanation, Central and Eastern Europe is trapped by its communist past even in the methods it uses to try to overcome it.

Finally, Horne and Levi suggest that lustration became the dominant form of transitional justice used in Central and Eastern Europe simply because once it had been adopted as the strategy of choice by Czechoslovakia, other countries chose to mimic the policy—to lesser or greater degrees—rather than opt for an original or different solution.

The major alternative to lustration considered in Hungary was the “Justitia” plan put forward by the MDF and made public in August 1990. It argued that “those who were responsible for Hungary’s catastrophic situation” should not be in a better position under the new democratic system than those who were not, and called for, among other things, the bringing to account of this group via criminal proceedings. The full scope of the plan was much broader, aiming to curtail the ability of the former political elite to convert its power into economic capital, for example, by reducing the pensions of pre-1990 political office holders and regulating the highest wages at state-owned companies. As noted by Fowler, this plan relied on a perception that the whole post-1956 period, including the transition, had systematically privileged communist elites. It represented the Right’s frustration at the continued influence of communist elites and its own inability to achieve its goals.

The main outcome of the Justitia plan was a bill proposed by Zsolt Zétényi and Péter Takács of the MDF, concerning the prosecution of criminal offenses committed during the communist era. The law provided that the statute of limitations start anew on May 2, 1990, for the crimes of treason, voluntary manslaughter, and infliction of bodily harm resulting in death, but only in those cases where “the state’s failure to prosecute the said offenses was based on political reasons.” Zétényi and Takács did not have the full support even of their own party, but given the fragility of the coalition may have been allowed to pursue the law as part of a political deal with the less fervent anticommunists in MDF.¹⁵ In the law that was eventually passed, actions that had been legal in the communist system were not criminalized. Rather, the statute of limitations was extended only for previously defined crimes where prosecutions had been blocked by the communist regime. The Constitutional Court later struck down the law on the grounds that, in the post-transition constitutional rule of law state, it violated legal security since there should be no punishment without a valid law in effect at the time. This distinction between what was valid in the post-transition “constitutional state” and the communist-era “nonconstitutional state” would also figure in debates about lustration.

LEGISLATION AND DEBATE

Given the high level of politicization of the lustration debate in Hungary, we find it relevant to organize the following account of the various legislative initiatives according to the parliamentary terms in which they were introduced. Each section begins with a short description of the composition of the government and opposition at the time.

1990–94

The first parliamentary election in 1990 brought to power a governing coalition of three center-right parties: the Hungarian Democratic Forum (MDF), the Christian Democrats (KNDP), and the Independent Smallholders Party (FKGP). The communist-successor party, the MSZP, suffered a major defeat and hence the Alliance of Free Democrats (SZDSZ) constituted the largest opposition party. The other main opposition party was Fidesz, which at that time was a liberal party. The governing coalition had a small majority and was rather fragile, creating “a persistent need to make various special deals with the various factions who were threatening to withhold their crucial votes from the government program.”¹⁶ The path of the lustration debate and resulting policy was shaped partly by such deals.

Although the government was composed of parties that had been loudly opposed to the communist state-party system, the first draft law aiming to resolve the problem of how to treat the agents and files of the former security organizations was tabled by Gábor Demszky and Péter Hack, two MPs from the opposition SZDSZ, in October 1990. This Draft No. 482 set out three objectives:

- to advance “the purity of democratic public life evolving after the transition”;
- to put a restraint on the ability to participate in politics and public life of “persons who, acting on behalf of the organization [the Ministry of Interior Section III, Directorate III, the department responsible for internal protection¹⁷] played unambiguously political roles in the former regime”; and
- to forestall “incidental abuses,” that is, the risk that, owing to a lack of security concerning the storage of files at the Ministry of Interior, confidentiality could not be guaranteed and information might be leaked into the public sphere.

The activities regarded as relevant were service as a top-secret officer or a network member.¹⁸

According to the draft bill, a register was to be compiled of all the people who had served as top-secret officers or network members for the III/III. One copy of the register would be held by the prime minister, another by the president, and a third by the Parliament's National Security Committee. The president was then to disclose the names of those people on the list who were also in positions of public office. Prior to this act of disclosure, the bill required that the persons concerned should be informed that their names were on the register. The affected persons would then have the right to renounce their public office, in which case their involvement with III/III would not be made public, or to dispute the authenticity of the data by making an appeal in the courts—in which case the court would conduct a review of the evidence.

The names of the affected persons would thus be disclosed *only* if the authenticity of the data was proved (or unchallenged) *and* they chose to remain in their positions. In this way, the bill aimed at a lustration policy that was essentially without official sanction, other than the *threat* of disclosure, although the implicit expectation was that most affected individuals would resign rather than face public outcry. This focus on disclosure was to become the essence of the Hungarian lustration policy. Without actively prohibiting former collaborators from conducting public roles, the bill aimed to create a situation whereby the public could be sure that those serving in public office either had not worked as informers or, if they had, that the matter was common knowledge.

The terms and conditions set out in the bill were very much the product of the political circumstances in which it was created. Prior to the municipal elections in the fall of 1990, a conflict developed between the two largest parties in the Parliament: the MDF and the SZDSZ. A rumor emerged that the government wanted to use the former security service files in its possession to discredit the opposition before the elections, and in the conflict-ridden political atmosphere, this seemed credible.¹⁹ The bill's primary aim was thus to prevent such abuse of the documents and it more or less fulfilled this task.

Although the draft was voted down by the government, it nevertheless created pressure for a lustration policy of some kind. Thus, on May 13, 1991, the government tabled its own bill on lustration: Bill No. 2294. The preamble set out "the promotion of the transparency of the democratic state" as the aim of the legislation.

Parliament started to debate the draft more than half a year later, on November 26, 1991. More than 250 amendments were accepted, though the bill consisted of only eight paragraphs. Given the number of amendments, the government asked to take back the draft for revision on June 22, 1992. The

government finally handed in its revised draft in the fall of 1993. The debate lasted until spring 1994 and the bill eventually adopted by Parliament came into force only on April 5, 1994. The vetting process was to be carried out by two or more Lustration Commissions each comprised of three judges. Three of the six judges for the first two Lustration Commissions were finally elected on April 7, 1994, the last day of the Parliament that had been elected in 1990.

The law, Act XXIII of 1994, retained the essential features of the Demszky-Hack draft. The public positions to be vetted were defined in the second section and included a broad sweep of offices from parliamentarians to senior public administrators (the categories are discussed in detail in the third section of this chapter). The investigation process was intended to establish whether these individuals had performed one or more of the activities defined in section 1 of the act: that is, whether they had served as career officers,²⁰ top-secret officers, or network members of III/III; had been in a position in which they received information collected by III/III; had been a member of the fascist Arrow Cross Party [*Nyilaskeresztes Párt*];²¹ or had served as detachment police during the revolution of 1956. These were the past activities deemed relevant for vetting.

After carrying out the investigation (i.e., the process of vetting), the Lustration Commission could issue one of three types of decisions:

- (a) a declaratory decision that the vetted person did perform the activity;
- (b) a dispensational decision (i.e., where incriminating data was found but there was insufficient evidence to prove the activity according to the law²²); or
- (c) a decision on terminating the procedure (for example, because an individual resigned from office during the procedure or his or her mandate ended during the procedure).

Those persons who underwent vetting but about whom no data was found (i.e., the majority of those vetted) received a letter to that effect. The individuals to undergo vetting were also informed about the investigation when it commenced and were invited to provide information in hearings.

In sum, if the investigation found that persons had been involved in the relevant activities defined in section 1 of the law, they were given the opportunity to resign from their public position. If they chose to resign, the information about their past was not made public. If they chose not to resign, the court issued a decision of type (a), but the individuals could retain their post. The only sanction of the law was thus the threat of disclosure. However, there was an expectation, when the law was drafted and passed, that individuals

found “guilty” would resign their office rather than face the disclosure of their past. Individuals undergoing vetting had ample opportunity to appeal the commission’s findings before they were published and to deliberate over their personal course of action should their involvement with III/III be established. The law therefore did not apply to people whose names were on the list, but who did not occupy the sort of offices defined in section 2 of the law (these aspects of the process are further elaborated in the next section of this chapter). If the law does not regulate otherwise, the procedure of the commission is based on the 1996 Administrative Procedure Act (Act No. LXVII of 1996).

The repeated delays in finalizing the lustration law meant that Members of Parliament elected in 1990 effectively escaped lustration. The reason for the delay is debatable. Some argue that it simply took time to make a good law. Others, including Iván Szabó, former minister of the 1990–94 government, argue that the MDF-led government intentionally sought to delay the bill because the MDF would have lost its parliamentary majority if its own MPs had been vetted, since a large number would have been forced to resign.²³

Six months after the law was passed, the Constitutional Court proclaimed the main provisions of the law unconstitutional. Its 60/1994 (XII.24) AB adjudication raised two main questions in connection with the law and called on the Parliament to eliminate the unconstitutional parts of the law by September 30, 1995.

First, the Constitutional Court stated that the law was unconstitutionally arbitrary in the criterion used to define those who should undergo lustration, leading to unconstitutional discrimination between the groups obliged to undergo vetting and those free from such requirements. The court ruled that the groups liable for vetting should be selected according to a single principle, which was subsequently defined by Parliament (see the following two sections).

Second, the court held that the law was unconstitutional in that it “failed to ensure the exercise of the right of informational self-determination,²⁴ especially the involved person’s right to inspect his personal data.” As Halmai notes, prior to the passage of the lustration law, both the right of informational self-determination and the right of public access to legitimately public data were strongly upheld by the Constitution.²⁵ The lustration law pitted the two principles against each other. To resolve the issue, the Constitutional Court held that public persons have a smaller sphere of personal privacy than other individuals in a democratic state.

The court’s two objections were addressed by Parliament’s decision on the principle according to which individuals could be identified as liable for vetting and by modifications to the law.

1994–98

The government was defeated in the 1994 elections and the MSZP came to power in coalition with the smaller SZDSZ, thereby forming a center-left government led by Prime Minister Gyula Horn.

The new government was slow to present a new draft to Parliament, hence its law on lustration (Act LXVII) finally came into force in 1996, more than six months after the deadline laid down by the Constitutional Court. The law established the legal conditions for exercising the right of informational self-determination, primarily by creating the Historical Office. All documents of the III/III career officers not relevant to the contemporary national security services—because of their data contents—were to be placed in this office (section 25/A (1)). All citizens had the right to apply for access to information regarding themselves.

The glaring problem with this solution is that the task of deciding what kind of data should be given to the Historical Office was entirely entrusted to the present national security services. It is therefore based on the—arguably highly unrealistic—assumption that a secret agency would label some of its own data redundant. While it might be acceptable that the proven interest of the present-day secret services can constitutionally limit the attainment of data, an appropriate guarantee procedure is required for the definition of the exceptions. This can only be ensured by court procedure.

According to the intention of the legislature, the law would have expired on June 30, 2000. However, the law has since been extended and the vetting process continues at the time of writing, in spring 2006.

1998–2002

The center-right Fidesz-MPP won the 1998 elections and formed a government with the MDF and the FKGP, led by Prime Minister Viktor Orbán. Fidesz had moved progressively to the right in the years before this election and continued to do so during its term in office.

In November 1998, László Csúcs MP (FKGP) handed in a new draft (T/378), which would have extended lustration to the upper ranks of the media, referring to the reasoning of the Constitutional Court decision 60/1994 (XII.24) AB, according to which the lustration of those participating in “shaping the public opinion” is constitutional and reasonable. This proved highly problematic, since neither the Constitutional Court nor any of the existing laws allows a clear determination of which persons take part in influencing public opinion (as discussed further in the third section of this chapter). Csúcs finally withdrew his draft but some of his ideas were incorporated into the government’s

subsequent draft. In 2000, Parliament adopted Act XCIII, which extended significantly the list of those who should go through lustration, compared to the modification in 1996 and the original law of 1994. The new categories were mainly media representatives, although the problem remained that there was no law from which the concept of direct or indirect influence of public opinion could be derived.

The next amendment, enshrined in Act LXVII of 2001, made essential changes in the legal status of the Historical Office, converting it into an archive where the documents of the present public security organizations should also be placed as well as the documents of the former public security organizations. In this way, the documents of the secret services of the (post-communist) constitutional state and the (communist) nonconstitutional state were brought together.

2002 ONWARDS

On June 18, 2002, it was disclosed that current Prime Minister Péter Medgyessy had served as a top-secret officer of the former III/II directorate (counterintelligence) of the communist-era Ministry of Interior. The scandal showed that the legislation in force was inadequate to ensure the purity of post-transition public life. Under the weight of intense press coverage and opposition pressure, the government tabled two new drafts (T/541 and T/542) in an effort to finally settle the issue.

The main aims of draft T/541 (subsequently adopted on December 23, 2002) were to establish a new Public Security Services' History Archive (hereafter, the Archive), and to bring together all the documents of all of the security service directorates in that one location. In addition, the law makes the documents available, thus facilitating the exercise of the victims' right of informational self-determination, but this followed the procedure already set out in the 1996 law.²⁶

The aim of the legislation was therefore not so much to hone the process of vetting those in public positions, but rather to focus on how the state should deal with the information gathered by the past regime's public security services. The law set out the state's role in providing or withholding information that might contribute to revealing the past; the need to reveal the past was held to be relevant primarily in the cause of compensating victims, as well as facilitating scientific understanding—that is, assisting historians in their academic pursuits.

One proposed amendment suggested that, if the legislature finds it reasonable to reveal the functioning of the public security services thoroughly

and in detail, it could consider establishing a Public Security Commission of Enquiry—along the lines of a truth commission—to deal with the whole issue of lustration. However, this suggestion was rejected.

Draft bill T/542 had rather different aims. Whereas T/541 took a fairly broad approach to revealing the past, with its emphasis on organizing the documents of the security services and making them available for the purposes of better understanding history, T/542 was more concerned with cleansing. It focused on people active in contemporary political life and sought to understand whether any hidden interests or agendas—relating to their conduct under the communist regime—might underlie their current actions. One controversial feature of T/542 was its suggestion that church leaders were liable for vetting, on the grounds that, like media representatives, they influence public opinion and undertake public tasks—and indeed receive significant financing from taxpayers' money. T/542 was dropped after extensive amendments had been proposed.

The 2002 law that was finally accepted represents a significant shift in policy, since it provides for the disclosure of information rather than just the avoidable threat of disclosure. It creates the opportunity to reveal the personal past of individuals in public office, although it does not clearly define which offices fall into this category. The basis of the law is the notion that the information collected by the security services significantly influenced the life of a person and the society—through various operative games, deliberate gossip, and, often, conscious disinformation. Hence, keeping these actions secret would deprive the individual and society of the chance to examine the true circumstances of past events. Moreover, by revealing what interests might lie behind the actions of public officials, the law aims to meet the constitutional requirement that “the functioning of the state should be transparent for the citizens.”

The main features of the law are that:

- Anyone can request data and files collected by the former secret service related to himself or herself.
- Anyone can request the files of those people who are currently in public office or had been in public office. The category of public office is not well defined in the law but has been taken to include anyone who serves (or served) in positions of executive power or the media. Indeed, it can be interpreted very broadly.
- In the case of those in public office, some very limited information found in the Archive about an individual's relationship to any of the

security service directorates (not just III/III) can be published. The limits are not explicitly laid down in the law. In the case of an individual's own files, only that data can be published which relates to that individual *alone*, except in the case where another person gives consent to the publication of data relating to himself or herself.

The task of historians in trying to discern which kind of activities an individual engaged in remains difficult. It is nearly impossible to study an entire set of documents, not least because of the gaps owing to destroyed data. In some cases the motives can be concluded—for example, where documents are found relating to payment, reward, allocation of a state-owned flat, or out-of-turn passport allocation. However, the files that are received relating to any public official have all names blacked out except the code name of the agent. Only since 2003 has it been possible for individuals to request that the identity of the agent (i.e., the real person behind the code name) be revealed.

Although the 2002 law could substantially increase transparency, the procedure is time consuming and expensive, which could deter many citizens from requesting documents. The passage of this law, and indeed the failure of draft T/542, has been criticized by several commentators.²⁷ One common criticism is that the law that was finally adopted fails to guarantee that the Archive will receive all of the relevant documents, because the present-day security agencies have the task of deciding which documents to surrender and which to retain. This arguably leaves ample scope for the contemporary security services to inhibit, whether intentionally or not, the revelation of past events.

The Medgyessy scandal in 2002 also prompted another development relating to lustration, since Parliament responded to the revelations by establishing the so-called Mécs committee, led by Imre Mécs, an MP from the junior governing coalition party, SZDSZ. Since Medgyessy had been accused of working for Department III/II of the former security services, the scandal, among other things, drew attention to the fact that the vetting laws only covered activity for the III/III. The Mécs committee was therefore tasked with collecting information relating to the other departments of the security services about the activities of all cabinet members since 1990. The information was provided by the contemporary security services and the Archive. The committee operated for some months and collected a great deal of information. However, before it was able to publish a list of individuals involved, the Constitutional Court ruled that the parliamentary resolution founding the committee was unconstitutional, because there was no clear legal grounding for

the collection of this data by a parliamentary committee.²⁸ Parliament should have established the committee in a law rather than through a resolution. The court further ruled that the work of the committee was unconstitutional.

In 2004 and 2005, new scandals arose concerning revelations that certain sports stars, musicians, and cultural critics were former agents of the political secret police. The evidence against them had been found by scholars in the Archive. These scandals prompted some MPs from the Socialist Party to present draft modifications of both the law and the Constitution. The proposed amendment to the Constitution (T/14239) would make the personal data of those who were employees of the political secret services and those who cooperated with this organization public information.

The draft law (T14230) would publish the names of these persons. On May 30, 2005, the draft amendment to the Constitution failed to gain the necessary support, but the draft law was adopted by a vote of 194 to 6, with 129 abstentions. The president, before signing the law, asked the Constitutional Court to oversee its constitutionality. In October 2005, the court, in its decision 37/2005 (X.5) AB, partly annulled the law. According to Hungarian regulations, in such a case the president must send the law back to Parliament for correction. However, Parliament had not corrected the law before the end of its mandate in spring 2006. It is not yet clear whether the newly elected (in April 2006) Parliament will revisit the draft or not.

IMPLEMENTATION AND CONSEQUENCES OF THE VETTING LAW

VETTING BODIES

According to the 1994 law, vetting was to be carried out by two or three commissions, composed of three judges each. The judges were nominated by the National Security Committee²⁹ of Parliament in agreement with the president of the Supreme Court and elected by Parliament for a fixed period, normally two years, renewable indefinitely. The first three judges were named just before the 1994 election. However, the appointment of two of the three was annulled eighteen months later owing to incompatibility rules.³⁰ Of the six judges elected in 1995, four remain members of the commission today, having served under three different Parliaments, reflecting a high degree of consensus across the parties regarding their selection. In 2000, five new judges were appointed, bringing the total to nine.

The law provides no procedural guidelines or information about how to select the nominees, and there is no written information on how it has been

carried out in practice. Certainly, the judiciary did not select the judges; indeed the president of the Supreme Court only has the right to agree or disagree with the proposal of the National Security Committee. The judges come from different regions within Hungary.

Until 1996, the salary of the judges was decided by the government (cabinet). In matters other than payment, the terms and conditions applicable to the judges are those set out in the civil service law. Their payment is regulated by Parliament (by Act LXVII of 1996) and employers' rights are exercised by the Speaker of the House.

The budget of the commission comes under the "parliamentary offices" part of the budget law, but is not listed as a separate item. Therefore the commission's spending, both past and present, remains unclear. The 1994 law provides that the central budget shall cover the expenses of those agencies related to reviewing the archives and providing data for the commission.

In terms of staff, each commission is served by one professional and one administrator. Since there is no archivist among them, the judges rely heavily on the expertise of the people working in the Historical Office (HO); prior to the establishment of the HO, they were helped by officials at the Ministry of Interior. The commissions do not employ experts; rather, the judge interviewed stated that the judges educate themselves on the relevant matters.³¹

VETTING PROCESS

The law determines the order of investigation by listing the different categories of positions to be vetted in order of "importance," beginning with MPs, the president, and members of government, through to high-ranking public servants and finishing with media representatives, members of local governments, and the judiciary. Within any one group of positions the order of investigation is alphabetical. Each Lustration Commission was involved in performing investigations in every category.

According to information provided by the Lustration Commission, 9,548 persons had been vetted by the end of 2004, of whom 20 were not suspected of serving as agents but rather were people who had received information from agents (and were thereby subject to vetting under section 1(d)).

As of the end of 2003, data indicating suspicious or incriminating evidence was found in only 126 cases (115 concerning former agents). Of these, twenty-four individuals left office—which they could do at any stage throughout the process—and hence ceased to be liable for vetting. In these cases, we can presume that the individuals felt that sufficient evidence to prove their involve-

ment with III/III had been found or expected that it would be found; indeed, many of these individuals probably resigned only after exhausting legal procedures to appeal against the evidence found. A further fourteen investigations were terminated (e.g., if an individual's mandate in the role subject to vetting ended). In forty-two cases the Lustration Commission issued a "dispensation," meaning that some information had been found but it was insufficient to prove the person's involvement. In only fifteen cases were decisions published, meaning that two pieces of evidence were sought and found: ten were people who had received information (and hence were liable for vetting according to section 1(d) of the law) and five were actual agents. Two cases are currently before the courts and a further twenty-nine are being investigated by the commission.

TABLE 1

Summary of outcomes of vetting process as of early December 2003

7,872	Total number of persons vetted
126	Incriminating data found
24	Individual resigned from office during investigation
14	Investigation terminated (individual's term in relevant office ended)
42	Dispensation issued
15	Decisions published ³²
2	Cases currently in court
29	Currently under investigation

SOURCE: Lustration Commission

The Report of the National Security Committee (1991) stated that there remained 43,983 "No. 6 cards"³³ in the files, relating to 27,133 network persons. Comparing this to the data provided by the commission, we conclude that after examining almost 8,000 of the 27,133 individuals, the commission has been able to prove activity related to the III/III in only 29 cases. The commission published decisions relating to five persons, while twenty-four persons resigned from office (probably, we assume, in order to avoid the publication of a decision). In sum, incriminating data has been found in 115 cases, of which almost one-fifth chose to resign from office. This suggests that the law, while having no explicit sanction, has in effect made it difficult for persons with a past record of involvement with the former secret services to hold public

office in contemporary Hungary. However, in almost another 40% of cases, a dispensation decision was passed. In the case of only five agents—and ten others liable for vetting under section 1(d) of the law—were decisions published revealing their past activity. The number may yet rise in the remaining months of the procedure since thirty-one cases remain in court or under investigation.

Since only a tiny fraction of the commission's work is made public—that is, the published decisions—it is impossible to know the distribution of those vetted among various institutions and categories. We can only say that the commission has screened every member of three Parliaments, as well as the highest-level officials in public service and the media.

VETTED INSTITUTIONS

POLITICIANS

We do not know how many of the 126 cases of “data indicating suspicion” are related to MPs. The commissions have published only two decisions relating to MPs, both in 1997. Five people who later became MSZP politicians were initially vetted under section 1(d) of the law; when they subsequently became MPs, the commission republished these decisions. As of June 2004, Members of the European Parliament also became liable for vetting.

According to the 1994 law, party officials and members shall not be screened (unless they fall into another screening category). Act XCIII of 2000 decided to investigate the members of the regional and county-level party presidiums, or the corresponding level of leadership, but only parties having the right to be supported by the central budget are relevant in this group.

JUDICIARY AND PROSECUTION

The vetting of judges and prosecutors was ordered by the 1994 lustration law, but before any judges had in fact been screened, the group was omitted in the 1996 modification (Act LXVII). Judges and prosecutors ceased to be liable for vetting following the Constitutional Court decision (60/1994 (XII.24) AB) that the positions to be vetted should be decided according to a single principle; the legislature subsequently decided that this principle was that the position be elected by Parliament. The decision to make election by Parliament the appropriate single principle arguably reflected political considerations, with the socialist majority preferring a principle that minimized the number of positions liable for vetting.

Nevertheless, the 1996 law does provide for the investigation of ombudsmen, members of the Constitutional Court, the president and vice president of the Supreme Court, and the chief prosecutor and his deputies on the grounds that the holders of these positions are either elected by Parliament or are required to take an oath before Parliament or the president of Hungary. A further amendment to the law (Act XCIII of 2000) reintroduced the categories of judges and prosecutors to the positions to be vetted.

Notaries and solicitors did not fall into the categories identified by the law, but the 2000 amendment guarantees them the right to voluntary self-screening.

PUBLIC ADMINISTRATION

The 1994 law ordered screening up to the level of heads of departments (and equivalent positions) in the ministries. In local government, only mayors were to be screened (and only down to the level of towns, not villages). Other state employees were also to be examined, such as employees down to the level of department heads at the universities and colleges (if the state is the majority owner).

However, the scope of screening in the public administration was significantly curtailed in 1996, before the process had reached this group. The 1996 law orders the screening of the public administration at the highest level only: the president of Hungary, members of the Cabinet, the president and vice presidents of the State Audit Office, state secretaries of the ministries, president and vice presidents of the national bank, members of the Bank of Issue Board, and presidents and vice presidents of the Office of Economic Competition. The 2000 law did not extend the vetting categories in this field.

The police, including part of the military and border police forces, were to be vetted down to the level of chiefs. This category was treated only as a subset of "public administration." At no stage did any of the laws or even draft bills include a deeper vetting of the military or police.

There are no published decisions of the commission within this category.

THE MEDIA

According to the 1994 law, the following positions must be screened: presidents of Hungarian Public Television and Radio, the head manager of the Hungarian News Agency, editors and persons in higher positions than editors in those organizations, and editors and persons in higher positions than editors at those daily and weekly newspapers with a distribution of more than thirty thousand.

However, because of the principle for defining positions influencing public opinion chosen by the legislature in 1996 (following Resolution 60/1994 (XII.24) AB of the Constitutional Court), only the presidents and vice presidents of Hungarian Public Television and Radio and the head manager of the Hungarian News Agency had to be screened.

Act XCIII of 2000 requires screening of the media on a much wider scale, extending the scope of the law beyond the level of editors, to “those, who have the effect to influence the political public opinion either directly or indirectly,” and is also applicable to commercial television, radio, newspapers, and Internet news agencies. In the case of television, radio, and the press, local, regional, and countrywide television channels and newspapers were affected, irrespective of their size.

The interpretation of these provisions was left to the commission, which faced considerable difficulties. While compiling a list of names and addresses for MPs had been straightforward, defining the relevant media personnel was far more complicated. Based on the rather vague criteria of influencing political public opinion directly or indirectly, the commission had not only to identify the relevant newspapers but also to select the names of journalists to be vetted. Constitutional Court Resolution 31/2003 (VI.4) subsequently omitted the category of “indirect” influence. However, by this time, the screening of the press was almost finished. According to the legal representative interviewed, the Constitutional Court decision brought the law into accordance with the commission’s practice (although unwittingly), since the commission had been unable to use the category of “indirect influence.”

The procedure related to the printed press began with the onerous task of selecting the relevant newspapers from a list of the many thousands of those registered at the Ministry of Culture. Because the closure of a newspaper does not have to be reported to the ministry, the commission had first to identify which newspapers still existed. That done, the commission proceeded by writing to the owner and head of the newspaper requesting a list of journalists³⁴ who fit the category of the law (i.e., editors, etc.). There was no sanction for not cooperating with the commission.³⁵ However, the judge interviewed by the authors could recall only one case where a newspaper had not cooperated.

The commission used the same method for radio and television stations. However, this practice could not be applied to the Internet news agencies, because there is no register of them. This question was raised and reviewed by the Constitutional Court (31/2003 (VI.4)), which did not find the provision

inapplicable. However, Constitutional Court Judge István Kukorelli, in a dissenting opinion, said that it is impossible to determine the list of Internet news agencies based on the text of the law. According to the judge interviewed, in the absence of a clear guideline from the law, the practice of the individual commissions was different. One commission did not examine Internet news agencies because of the lack of the required state register, and another commission contacted one of the associations of Internet news agencies and asked for its help in compiling data about it. The commission also notified the speaker of the Parliament that a register and state agency responsible for registering Internet news agencies does not exist.

Act XCIII of 2000 granted journalists who did not fall under the purview of the law the option to apply voluntarily for screening.

Until December 2003, among all of the journalists investigated (presumably comprising a few thousand individuals), only three were found by the commission to have performed the relevant activities. From the information provided by the commission, we cannot tell whether the two cases at court are related to journalists, although this is likely.

The judge interviewed was not certain if the screening of the press and electronic media (not including Internet news agencies) had been comprehensive, but said that they had done what they could. The commission also asked the owners of newspapers to inform it if there were personnel changes in the positions to be vetted. Meanwhile, the board of trustees of the Hungarian Radio asked the ombudsman for data protection whether employers could ask employees to show the documents they receive at the end of the vetting process. The ombudsman ruled that employees cannot be compelled to do so.³⁶ In his 2002 report to Parliament, the ombudsman wrote that “disclosing the state security past of individuals at present is the right of the individual or the lustration commission.”

PROCEDURE OF THE COMMISSION

If the law does not regulate otherwise, the procedure of the commission is based on the 1996 Administrative Procedure Act (Act LXVII of 1996). The commission was affected by later amendments, but there was no serious change with regard to procedure. The 1994 resolution of the Constitutional Court did not find it unconstitutional that the screening was not carried out by a court but ruled that the commission was constitutionally required to work according to the Administrative Procedure Act.

The procedure comprises several stages:

*IDENTIFICATION OF PERSONS WHO SHOULD BE VETTED
UNDER THE LAW*

Although the law determines what kind of positions should be screened, the individuals to be vetted must be identified. In the case of civil servants, identifying the appropriate individuals was straightforward, because the law is very clear about the positions. However, the process of identifying those who fell under other, less clearly defined categories, for example, that of the press, was sometimes problematic.

COLLECTION OF DATA FROM THE REGISTER OF THE III/III

Judges did not collect the data relating to the person under investigation themselves, but rather received it—initially from the Ministry of Interior and after 1997 from the HO. The collecting process began when the commission provided a list of the individuals to be vetted, after which ministry officials and later the archivists of the HO searched the register. They were required by law to send to the commission data that indicated involvement in the activity defined in section 1 of the law. In 1999, the Constitutional Court was asked to examine whether it was an unconstitutional limitation that the commission's ability to examine documents depended on the *decision of the possessor* of the document; the Ministry of Interior both possessed the documents and decided whether they should be sent to the commission. The court was laconic in its decision, saying that the commission has the possibility to use other evidence as well, and that it "can evaluate the evidences freely."

Indeed, the Lustration Commissions have in practice undertaken additional research in other archives, in some cases turning to the previous employer of the vetted individual and asking for old personnel files—for example, a CV helped them to clarify the facts. The commission has also been able to find witnesses—for example, a contact official or recruiting official of an agent. Such research by the commission was especially important in cases where the data found in the files were not sufficient to prove the activity, for example, where only a No. 6 card was recovered. According to the judge interviewed, the judges do not see it as their duty to find *all* data relating to the person under investigation, but rather carry out research until they find enough data for proof of the activity.

The HO submitted a report annually to Parliament, including an account of work done for the commission. When the HO was established, the vetting of MPs elected in 1994 and high state officials had already been completed.

The following data are taken from the J/2943 report of the HO, which has been submitted to Parliament, but not yet voted on. It concerns data about the activity of the HO related to the commission from 1997 until March 2003.³⁷

TABLE 2

Commission requests for data

	1997	1998	1999	2000	2001	2002	2003	TOTAL
Requests for research	10	28	14	28	81	53	3	217
Number of persons concerned	26	244	44	97	1939	1842	42	4234

SOURCE: Historical Office

During 2004, the commission requested information from the HO relating to a further 1,676 persons, bringing the total number of persons about whom information has been sought to 5,910. The reason for the high number of investigations in 2001 is that Act XCIII of 2000 extended the positions to be investigated. The report cannot reveal in how many cases incriminating data was found.

THE HEARING

Until the modification of the related rules (in 2000), a hearing was performed in every case, irrespective of whether the commission had found any evidence. This equal treatment for all was intended to prevent a situation in which the media would suspect guilt if a hearing was held. However, in 2000 the policy was changed such that a hearing was made obligatory only in those cases in which incriminating data were found. This move reflected a need to save resources since considerable time and effort was wasted in sending out invitations to hearings and preparing for or holding hearings that few people attended.³⁸ Moreover, the initial concern that the media would closely follow who attended the hearings—and might thus infer that someone had indeed been an agent—disappeared as media interest in the process waned.

The procedure is that the vetted person is first informed that incriminating data have (or have not) been found and the relevant documents are presented at the first hearing, thereby providing the vetted person with an opportunity to question its reliability. The hearing is a closed meeting. Legal representatives are able to attend, but in practice few individuals have taken lawyers to

the first hearing. However, vetted individuals do have legal representation during the court procedure. Vetted individuals are also informed if no information relevant to the law is found in their case.

EVALUATION OF EVIDENCE

Criteria of proof of lustratable activity. According to Administrative Procedure Act, the judge's right to evaluate the evidence is unlimited. The commission must investigate whether the vetted person served as a professional officer (either secret or open) at the III/III directorate of the Ministry of Interior, or had performed substantial activity for the III/III. In short, the commission was looking for evidence that individuals had:

- signed a declaration to undertake activity *and* submitted reports; or
- signed a declaration to undertake activity *and* received a payment, favor, or premium; or
- received a payment, favor, or premium *and* submitted reports; or
- had a No. 6 card *and* received a payment, favor, or premium; or
- had a No. 6 card *and* submitted reports.³⁹

The lustration law thus determines what kind of data shall be searched for in the registers and requires at least two kinds of data for proof of activity. Considering the great numbers of documents destroyed, it is perhaps not surprising that such extensive proof of involvement was found only very rarely. Resolution 60/1994 (XII.24) AB of the Constitutional Court makes it clear that the burden of proof does not rest with the person being vetted.

The court recognizes that the documentation remaining in the files is incomplete. This view draws on the National Security Committee's report, according to which most of the reports made by agents have been destroyed (or are held somewhere else in the archives of other parts of the secret service). Only the following documents remain: No. 6 cards, indirect evidence (e.g., financial documentation), and reports. Referring to the report, the Constitutional Court also concludes that part of the documentation remaining is not authentic—specifically, the No. 6 cards, also called “network records”—and for this reason stresses the importance of procedural guarantees and access to court appeal. The court finds acceptable only such procedures as guarantee that the published data are authentic.

The files and other evidence. In 1994, both the legislature and the Constitutional Court found it necessary to guarantee that in addition to the documents provided by the Ministry of Interior or the HO, the commission could use other

evidence. However, because the law explicitly states that the investigation shall be performed based on the data found in the documents determined by the law (section 8), the legislature emphasizes the prime importance of these documents. In practice, the commission has used additional information, including witness statements and documents from other archives, and has on occasion reviewed the original documents at the archive. The commission has consulted with external experts once or twice.

The most commonly found document has been the No. 6 card. Indeed it may happen that only the information on the card is available and none of the other information required by the law. By requiring two pieces of evidence for proof, the legislature implied that the No. 6 card alone is not to be regarded as sufficient. This is supported by the 1994 resolution of the Constitutional Court that states that the No. 6 cards were not signed by the individuals which they concerned, and hence do not have sufficient force of evidence.⁴⁰

In sum, there are two reasons for regarding the network register as possibly inauthentic: (1) because the network register is the internal register of the III/III, and (2) because data could be added into this register at a later date. Given that the register may not be authentic, the court stresses that the commission performing the investigation “is not bound by the documentation covered by the law, but can use any legal means of evidence... the Commission does not investigate the documentation, but it shall prove the substantial activity.”

With regard to the first reason, an important question is whether it was the practice of the secret services to open a No. 6 card on individuals who had never worked as agents. According to one argument often heard in the Hungarian lustration debate, there are several possible reasons to suspect that No. 6 cards may have been created even for individuals who had not worked as agents:

- every year a given number of agents had to be recruited; hence if insufficient numbers were really recruited, the officers had an incentive to open cards for non-agents as well;
- recruiting officers may have been rewarded financially according to the number of agents recruited, and would thus have had an incentive to create false entries;
- if two officers were competing to recruit a particular individual, one of them might have opened a card prior to successful recruitment in order to prevent the other officer from claiming the credit for recruiting the individual.

The Report refers to the possibility that officers may have been financially rewarded for recruiting people, thus creating a possible incentive to falsely claim recruits. Whether or not this was common practice remains unclear. The Report says that, "it cannot be excluded that certain officers... had written in the name of not-recruited people. But this manipulation could not happen too often. If the person had not reported continuously, a proposal had to be made for his exclusion from the service. Such kind of false recruitment would have been very complicated and risky." Yet the Report also refers to a case in which an officer had to leave the secret service because of false recruiting, thus suggesting that it may not have been common practice, or at least that individuals faced sanctions that might have deterred them from engaging in such fraud.

Archivist László Varga, interviewed by the authors, argues that even if the above reasons are plausible, one cannot assume that such methods were the usual practice of the security services. The No. 6 cards were established for internal use and nobody assumed that they would be accessible to others at some point in the future. Moreover, the security services worked according to a strict hierarchy and regulations, hence such systematic distortion of the data seems unlikely and might even have been counterproductive for career officers, who would presumably have risked punishment if their efforts to deceive their superiors in this way were found out.

With regard to the second reason, the former security services were accused of adding false documents in 1989–90, while all subsequent governments have been accused of destroying documents. However, these rumors of interference with the register may simply be part of the mythology surrounding lustration. According to András Gyekiczki (formerly deputy president of the Historical Office and chief of cabinet in the Ministry of Interior [1994–98]), it would be almost impossible to add false incriminating data or documents, because the code names and details would need to be added to several documents to reflect the massive cross-referencing that occurred among the original files. For the same reason, it would be difficult to remove records of an individual's activity since this activity could be reported anywhere else in the documentation. Nevertheless, the documentation of other secret service departments is not accessible. Therefore, in cases for example where only a No. 6 card was found (and the commission could not get any other evidence), it is not possible to say whether the card had been falsely placed in the register or whether relevant data might have been found in the archives of other secret service departments.

Moreover, while the Report held the opinion that proof of cooperation might be possible if the examination were extended to the documents of other departments, in 1999 the Constitutional Court implied that the activity of the other parts of the security services was only *partly* unconstitutional—and, by implication, that it should not necessarily be subject to vetting. This judgment was made in the context of the debate over whether the archives of departments other than III/III should be opened; the court ruling meant that they remained closed. In its resolution of 1994, the Constitutional Court had classified the archives of the III/III “and *partly* of the other secret services” (our italics) as against the rule of law. The 1999 resolution of the Constitutional Court subsequently referred to the arguments of the 1994 resolution, such that “only the activity contrary to the rule of law is data of public interest.”

The poor success of the commission in searching for evidence other than the No. 6 card is evident from the statistics. In an interview with former agent PM, he said that in his case, no information was available for the commission other than the No. 6 card and his former contact officer, who remembered nothing. In his case, the commission was able to state that he was a former agent, but only because he himself had gone public with his past activity in 1990.

The law does not say if the reports of the agent required by law as evidence shall be verbal or written, but from the published decisions it is obvious that by “report” the commission understands proof of the fact of giving information either verbally or in writing. Thus, in the case of EI, given the absence of proof of reports submitted by him when serving as an agent, a witness statement from his former contact officer was “substituted” as evidence of his having submitted reports.⁴¹ There were also instances in which agents had reported verbally only, but in such cases the contact officer generally summarized the report in writing and attached it to the file, thus providing evidence of reporting. The 1994 resolution of the Constitutional Court refers to the Report:

The Report says “yes” to the question as to whether it is possible to draw conclusions from the network registration as to who gave and who did not give reports. (Those who did not submit reports were excluded from the network and the documentation of this also survived.)

Nevertheless, to prove reporting activity without having the report itself has caused great difficulty for the commission. According to the legal representative of the commission, it could constitute proof of activity if the vetted

person was registered as an agent for a long period of time (more than two years) *and* during this period had met the contact officer many times. This interpretation originates from the Report, which takes the same view. The length of the period of being an agent is mentioned in the decisions.

In short, documentation on the basis of which the activity of an agent could be indisputably proved has not generally been available to the commission. Rather, the material has been limited in most cases to No. 6 cards (in themselves insufficient proof of past activity) and indirect evidence, for example, financial documentation showing that an agent received a payment or reward.

The *content* of the reports provided by agents is not mentioned in the law, despite arguments arising in the public debate that some agents who were blackmailed to cooperate tried to subvert the cause by providing only useless reports. However, the operative significance of the reports in most cases cannot be estimated in retrospect, although the contact officers knew why the agency requested information from the agent and for what purpose it would be used. The published decisions suggest that only the fact of reporting was considered and the content of reports was not evaluated.

The commission does not evaluate how or why someone became an agent—for example, whether he/she was blackmailed by officers to cooperate with the III/III—and does not impart this information in its decisions. It is possible that relevant evidence was not found, or at least not in every case. The fact of blackmailing was not mentioned in the case of the former agent known as PM, although he was considered a “trustworthy” person because the very little evidence found corresponded to the story that he had previously published.

Before the III/III sought to recruit someone, a report on the individual’s personal circumstances would be compiled. The agency used this to decide whom to target and how to approach an individual—that is, whether blackmail would be necessary or simply the offer of some reward.⁴² According to the judge interviewed, while it is possible to consider the agent as victim if he or she was being blackmailed, when a person continues to submit reports over a long period, building a career using the contacts of the III/III, it is not clear whether that person remains a victim. The secret services did seek to convince agents that it was impossible to quit the agency either on their own initiative or by being expelled. This message appears to have been well communicated. Today this also strengthens the “agent as victim” view. However, there were cases in which a person quit the agency on his own initiative; this

occurred with SK's two periods as an agent (he quit once in 1958, then again in the 1970s) and in the case of MP (he quit in 1987).

In sum, the content of the report, the circumstances of becoming an agent, whether or not one quit the agency on his or her own initiative, and the period of time spent as an agent could all be considered by the commission as part of the free evaluation of evidence, but in fact that appears to have played a role in only one decision. We also do not know whether the practice of the different commissions in regard to evaluating evidence varied significantly.

If agent reports were not found, the practice of calling witnesses, where possible, was probably the most important evidence. The No. 6 card was a starting point in this respect, since it included the name of an agent's contact officer. The commission did seek to reach these officers, although we cannot measure its success in doing so or in obtaining authentic evidence from them. It should moreover be noted that the contact officers in many cases could still be officers active in today's secret services (if they were not serving in positions to be vetted under the law). It could happen that they would be called as witnesses against people whom they themselves blackmailed into cooperating with the secret service.

DECISION OF THE COMMISSION

As discussed earlier, the commission can issue a declaratory decision that the vetted person performed the activity; a dispensational decision (i.e., where incriminating data was found, but insufficient evidence to prove the activity according to the law); or a decision on terminating the procedure (for example, because an individual resigned from office during the procedure or his mandate ended during the procedure).

The rules of decision making have not changed since 1994:

- (1) The commission in its decision declares whether the person under investigation performed the activity defined by the law.
- (2) The commission states those facts that form the basis of the decision.
- (3) The decision is to be communicated to the person without delay.
- (4) The decision is made by secret majority vote.
- (5) If the decision states that the person under investigation has performed the activity determined by the law, the commission shall call upon the person to resign from his/her office within thirty days or initiate a procedure to relieve him/her of office.

- (6) The commission shall also inform the vetted person that in the event of his or her not resigning, the decision of the commission shall be made public (fifteen days after the thirty-day period).
- (7) The commission shall also inform the investigated person about the option to go to court against the decision and ask for the decision to be invalidated.

Thus, according to the law those who leave their office voluntarily are exempted from the explicit sanction of the law (i.e., publication of the decision).

The objective of the law was to make it publicly known when people serving in certain offices under the post-transition state had undertaken certain past activities related to the III/III. The legislature at no point sought to pass an incompatibility provision, such that those persons would be prevented from holding office. However, the option to resign one's office has in practice functioned as an incompatibility regulation in that in many cases a vetted person has chosen to resign. It is clear from the commission's data that people affected have weighed the sanction of having their name published as a former collaborator against the option of leaving office, and many have chosen to resign either before or after the decision of the commission.

The Hungarian News Agency and the *Official Gazette* publish the decision. Act XCIII of 2000 provides that data published by the commission are data of public interest and that access to and the dissemination of those data shall be the right of everyone.

Decisions published by the commission. Of the twenty-one decisions published by the commission, five are related to former agents (two post-transition MPs and three journalists), and one to a former career officer; the remaining fifteen refer to persons who received data from agents for use in their work and are hence liable to vetting under section 1(d) of the law.

- According to the decision related to SK, a Christian Democrat MP, the evidence was established based on the signed declarations of recruitment (two, on different occasions) and on reports made by him.
- In the case of MV, a socialist MP, the commission had access to declarations of recruitment and reports made by her.
- In the case of PM, a journalist, nothing was found except the No. 6 card. No reports were found. The commission did bring in a witness—his former contact officer—but he remembered nothing. Thus, it was the

confession of PM that established the evidence. He was regarded as a trustworthy witness, because he had previously gone public about his past activity in 1990 and his story at that time fitted with the evidence found later.

- In the case of GG, a journalist, his reports were found. He did not attend the commission hearing, hence the case was decided on the basis of the documents.
- In the case of IE, a journalist, only the No. 6 card was found. The commission also considered the statement of a witness, and the fact that he was registered as an agent for several years and he was not deleted from the register. It is clear from the decision that the statement of the witness was very important, because he told the commission that the vetted person made verbal reports and it was his duty to summarize them in written notes. According to the commission this evidence together established the fact that the person had reported for the III/III. Hence the witness statement of the recruiting officer partly established the fact of reporting.⁴³

Another decision was published in spring 2004. It concerns a member of one of the regional party presidiums who during 1951–54 was an officer of the State Security Agency, operating within the Ministry of Interior (abolished in 1956). He had served in 1957 in a police detachment. This is the only case of a published decision relating to a secret service career officer.

We do not have any information about those who left office because of the vetting procedure, since their names are not published. However, in the case of IE, the decision also states that he had served in two positions falling under the purview of the law. When the procedure started, he left one of those offices. His other position was at the Hungarian Public Radio. In its decision, the commission referred to the statement of the president of Hungarian Public Radio, to the effect that he was an editor, and thus the commission could investigate him. IE later argued that his position did not have the title of “editor” and that he should not be vetted in respect to this position. However, based on the president’s statement, his work was editorial, and hence practically he served as an editor.

APPEALS TO THE COURT

Access to court was provided by the 1994 law. According to Resolution 60/1994 (XII.24) AB of the Constitutional Court:

judicial review is possible against the decision of the Commission, and this has a delaying force in respect of publishing the decision....The court shall review the decision of the Commission from the point of legality. According to the permanent practice of the courts, the legality of the decision shall also be established, if the statements of facts are not revealed, or the revealed facts were not evaluated correctly, the conclusion drawn from the revealed facts are against the documents or not reasonable.

If the court found that the decision of the commission was against legality, the commission started a new procedure.

Because we can only access the published decisions of the commission and the decisions of the courts are not published, we cannot say to what extent the practice of the commission changed—especially in regard to evaluation of evidence—because of the decisions of the courts. According to the legal representative interviewed, the only change in the practice of the commission due to the practice of the court regarded the assessment of reports, as previously discussed. However, in his opinion the fact that the court can order the commission to start a new procedure not only based on the legality of the decision, but also on the basis of new evidence that was introduced in the court rather than in front of the commission, serves to curtail the authority of the public administration body (against the Administrative Procedure Act). In his opinion, not only the decision making, but also the hearing of new evidence should be carried out solely by the commission.

None of the published decisions were for cases in which the Supreme Court had annulled the commission's first decision and ordered a new procedure. This implies that no new commission procedures have resulted in decisions where the activity could be proven. Rather, it appears that the cases that were brought to court ended either with dispensation decisions, with the individual resigning from office, or with a decision to terminate the procedure. The legal representative of the commission that we interviewed stated that resignation from office is generally the last resort, after all possibilities for legal procedures have been exhausted.

The procedure is secret both before the commission and in court. This was challenged, but the Constitutional Court in 1994 found that it was not unconstitutional.

The commission has not engaged in any public outreach or information campaigns.

RULES DETERMINED BY THE COMMISSION

According to the law (article 17), the commission can regulate all those issues not regulated by the law. According to the 1994 resolution of the Constitutional Court it is a constitutional requirement that in the application of this article the commission regulations shall establish no rights and obligations for people outside the commission. The judge we interviewed said that at the beginning of its activity the commission made some regulations relating to the procedure for information gathering and relations with the offices providing data. These regulations are all still applied today.

LENGTH OF THE PROCESS

Both the information-gathering part of the process and the commission procedure could take several months. Court procedures generally last for about one year, even in cases when the court was asked to review a case urgently and despite Act LXVII of 1996 accelerating the court procedure by requiring that the first hearing be held within thirty days. Thus, for an individual about whom incriminating data was found and who challenged the decision of the commission in court, the whole procedure could take about two years.

POST-VETTING SITUATION

PM stated in his interview that his past as a former agent influenced his choice of career, making him consciously decide not to work as a civil servant. Instead he worked in the private sector and later became a journalist (at a time when the law was not applicable to journalists, although in any case he had already made his activity public). When his position as a journalist became subject to vetting, he decided not to leave the position, therefore the commission published a decision about him as well.

The two politicians found to have worked for the security services as agents are no longer MPs, but they did not leave their parliamentary seats immediately after their past activity was revealed. They did not stand as MPs in the subsequent Parliament, but during their term they continued to work in parliamentary committees. MV today contributes to the largest Hungarian newspaper; more information on his post-vetting career is not available. SK is retired because of his age. PM is a journalist at the newspaper for which he previously worked.

SPECIFYING THE SCOPE OF THE LAW

The need to define the scope of lustration policy in two respects has provided the battleground for much of the policy debate in the last fifteen years. The problem amounts to specifying two circles:

- (1) The public office positions that are liable for vetting—that is, should only politicians and public administrators be vetted, or should the wider society be included, for example, judges, the media, and the church?
- (2) The activities performed for the communist security services that are regarded as relevant—that is, why was lustration limited to the III/III department, when several other departments existed and used agents to collect information?

The evolution of the debate on these two questions is analyzed in this section.

PUBLIC OFFICES LIABLE FOR VETTING

All lustration proposals in Hungary have agreed that parliamentary deputies, government members, and the president should be vetted. Beyond this, political parties have argued in favor of adding or subtracting certain groups, largely according to partisan interests. The Right has generally sought to expand the scope of the law while the Left has attempted to curtail it.

Section 2 of the law defines those officeholders liable for lustration. In the first law of 1994, this group included a broad range of political, administrative, judicial, media, and education positions, and even business (in the case of state-owned firms) leaders. Although the law in some cases defined certain subgroups according to whether or not they were obliged to swear an oath before Parliament, there was no overall consistent criterion delimiting the officeholders liable for vetting. This was highlighted by the Constitutional Court, whose Resolution 60/1994 (XII.24) AB stated that the law was unconstitutionally arbitrary in the criterion used to define those who should undergo lustration, leading to unconstitutional discrimination between the groups obliged to undergo vetting and those free from such requirements.

Resolution 60/1994 (XII. 24) AB further sought to provide a basis on which to draw this line by stating that posts liable for vetting should be those that “either through practicing executive power, taking a political public role, or through operating the...media of public opinion forming, are directly able to form public opinion. This principle is applicable only to those professionals

who have the task of political opinion forming.” The group could thus legitimately include nonstate posts, such as the editors of private media outlets. The court also held that the precise determination of those posts to be vetted was a political decision, outside judicial competence, and required that this determination should be made on the basis of a single consistently applied criterion. Although the court said it must be the decision of the legislature to determine this principle, it also stated that the principle could be “elected positions.” The legislature subsequently defined the principle as election by the Parliament or being required to take an oath before Parliament or the president of Hungary. Since judges and prosecutors are not appointed by Parliament, they were subsequently excluded from the 1996 law.

One of the most theoretically controversial and technically difficult sets of posts to define has been the media. The 1994 Constitutional Court resolution did not find the screening of the press unconstitutional in itself. However, according to the Constitutional Court, the 1994 law determined the scope of the positions to be screened too broadly because under the law some people and newspapers not involved in political programs were liable for vetting. The 1996 law thus required the vetting of only those media representatives who were appointed by Parliament.

Amendments to the law introduced by the center-right government of 1998–2002, culminating in Act XCIII of 2000, require screening of the media to a deeper level. This law extended the scope of vetting beyond the level of editors, to “those, who have the effect to influence the political public opinion either directly or indirectly” and is also applicable to commercial television, radio, newspapers, and Internet news agencies. The positions affected are:

- the editors in chief, assistants to the editor in chief, editors, and commentators of program suppliers who according to the 1996 law have direct or indirect influence on public opinion;
- the editors in chief, assistants to the editor in chief, editors, reader-editors, columnists, and main staff of public newspapers circulated nation-, region- or countywide and locally who have direct or indirect influence on public opinion;
- and the editors in chief of Internet news agencies registered in Hungary by the competent authority and with at least nationwide accessibility, their assistants, and trustees invested with right of news release who have direct or indirect influence on public opinion.

The move may have reflected the fact that the 1998–2002 government regarded much of the media as being allied with the leftist opposition; an

expansion of vetting might have been expected to have the effect of reducing the hold on the media of Left loyalists—perhaps more likely to have had a past of collaboration.

Apart from representatives of the media, the 2000 amendment to the law extended the requirement to be vetted to political parties, specifically “members of county and national presidency or adequate corporate representatives of parties entitled to state budgetary subsidy” and to professional judges and state attorneys. The law also created the possibility of voluntary vetting for lawyers, notaries, clergy, and media representatives who are not obliged to be lustrated.

Again, bearing in mind the 1994 opinion of the Constitutional Court, the decision to reintroduce the category of judges was controversial. The 2000 law simply retained the principle that those liable for vetting were the group of individuals who took an oath before Parliament and were appointed by it, but added an extra list of positions to be vetted. In 2003, the Constitutional Court then found the screening of judges not unconstitutional from the point of view of the independence of the judiciary (Resolution 31/2003 (VI.4)).⁴⁴ The court repeated its earlier view that it was the political decision of the legislature to decide on which positions should be vetted.

By contrast, the EU Monitoring and Advocacy Program (EUMAP) of the Open Society Institute (a project monitoring human rights and the rule of law in ten Central and East European countries and the five largest EU countries) disapproves of the screening of judges:

lustration is, by its nature, an extraordinary intervention against individuals who might normally not be removable, and is justified by exigent political circumstances, such as the political transition immediately after 1989. More than ten years after the event, the introduction of such rules at the least raises reasonable concerns that the motivations are more immediate and narrowly political. Because the initiative for expanding lustration at such a late date lay with the Government and Parliament, it may also be seen as an extension of political control over the judiciary, contrary to the spirit of the reform process.⁴⁵

Against this argument, it should be stated that, were judges to remain outside the scope of the lustration law, their credibility in court could be brought into question.

In 2003, draft T/542 (which was finally rejected) argued that if media representatives are liable for lustration, there is no constitutional reason why the leaders of churches are not. The interpretation that church leaders

do not meet the criteria of participants in political public life is problematic because based on this the inclusion of the leaders of public bodies—which the Constitutional Court regards as legitimate targets for vetting—could also be questioned. The option of entirely handing over the determination of the circle of people who should be lustrated to the legislature’s political consideration would allow the legislature subjective judgment to decide which clergy or public body takes “political actions shaping public opinion.” This decision could only be made on a political rather than an objective basis.

Thus draft T/542 argued instead that despite the differences in the inner structure of churches, the political expression of opinion in churches is not independent from the leadership of the church. In this case the church officials to be lustrated would not be selected according to the legislature’s political decision but by the autonomous inner rules of the churches; that is, the church would define the roles that shape public opinion. The lustration of the churches could be justified by their actions of public opinion shaping and the fact that according to the regulation in force the churches complete a range of public tasks. The churches also receive significant financing from tax revenues and the majority of churches seek to play an active role in the task of renewing the country morally. However, this draft was eventually dropped and churches hence do not come under the purview of the lustration law.

The final version of the law adopted in 2003 allows for access to limited information about the past security service activities of individuals currently performing “public activity.” In this regard, litigations appear likely, centering around:

- whether or not a person falls into the category of those performing “public activity.” The law does not provide guidelines for the Archive to decide who falls into this category (even in the most obvious cases), therefore a person wanting to know whether there is anything in the Archive related to the presumed “publicly active” person may start a litigation to decide this issue; or
- whether the documents to be made public are in accordance with the requirements of the law (i.e., that they constitute only very limited information). This might also consider what would be the possible consequences of publishing the data. This will again raise the issue of evaluation of evidence.

The problem with such a series of litigations is that the courts may evaluate the evidence and pass different decisions at every stage, while new evidence will continuously be introduced. One valuable side effect of numerous such

court procedures might be that the authenticity of the register and the validity and force of the records may be clarified. In the meantime, the career officers of the secret service will increasingly serve as witnesses at the court, taking on the mantle of “respectable experts” despite their own past and the impossibility of knowing whether their witness statements are authentic.

RELEVANT PAST “OFFENSES”

The decision to limit lustration to the Ministry of Interior Section III, Directorate III, responsible for internal protection, reflects the fact that the existence of only this department was public knowledge when the original Demszky-Hack bill was drafted. Once the much greater extent of the security services was revealed, the main political parties still showed little inclination to extend the scope of the lustration law to other branches of the security services. Rather, when in government, the MDF, MSZP, and Fidesz-MPP all argued that since only III/III had been abolished in 1990, any extension of the law to other departments would threaten the functioning of the new security agencies that were their legal successors. The MSZP further justified its position—particularly in response to criticisms by its 1994–98 coalition partner, the SZDSZ—by pointing out that the Constitutional Court had not found problematic the limitation of the 1994 law to III/III.

In addition to omitting informers for directorates other than III/III, the law also did not require the vetting of *employees* of the security services. Section 1(a) lists professional positions in the security services that are lustratable. However, this group was to be vetted only if its members later took on public positions (e.g., if they became MPs, etc.), and were not liable for vetting if they simply remained employees of the successor security services. Hence, those who served on the staff of the communist-era security services have in most cases not been vetted and indeed may remain employed in today’s security services.

While the first lustration law was being prepared, the opposition MSZP’s popularity was gradually growing. In an effort to quell the MSZP’s rise, the governing MDF gradually sought to broaden the scope of the law so as to include categories into which MSZP MPs might fall. The party argued that, in addition to collaboration with III/III, other past activities should be covered by the law: service in the police force in 1956–57, service in political or state positions in which one received information for decisions from public security organizations, and membership in the Arrow Cross Party, a wartime fascist organization. Since the membership of these groups could in any case

be ascertained from public records, the move to include these groups in the law appeared to reflect primarily political motives.

Amendments proposed by the SZDSZ during the 1994–98 period would have extended lustration to the whole security services, that is, also to the former departments III/I, III/II, and III/IV. However, the bill was passed without the amendments, and when the SZDSZ appealed to the Constitutional Court, it rejected the motions in its adjudication 23/1999 (VI.30) AB. The court stated that only the III/III was established “to be the support of the state-party,” implying that other directorates of the security services were not unconstitutional:

The other secret services, though the connection was very close, only partly could do such activity [i.e., activity contrary to the rule of law]. Therefore the fact, that any person is still or was the professional officer of another, still operating secret service, is not necessarily data of public interest.

The ruling was controversial since it took a view contradictory to that provided by a number of disclosed documents. Moreover, contrary to this statement, the court’s earlier 1994 decision had in several places referred to the security services as a whole and had indeed quoted the 1991 Report of the National Security Committee of Parliament as saying that personnel regularly moved among the directorates of the security services. Moreover, the publication of documents from other branches has shown that they engaged in similar activities to the III/III. János Kenedi, a prominent expert on the security services, has stated that orders given to the security services were general and did not differentiate among directorates; again implying that all directorates engaged in similar activities. Another argument against vetting other branches is that publication of information might have threatened the lives of personnel working as spies abroad. Yet there is no evidence to suggest that this argument influenced the Constitutional Court.

CONCLUSION

As predicted by Welsh, accusations of lustration have become a key tool of political competition in Hungary. Not only have changes to the lustration law over the years been motivated largely by the political interests of the parties promoting them, but in addition accusations have been used to damage the standing and careers of political opponents. In this latter respect, the

authenticity of the data published is scarcely relevant, since an accusation and ensuing scandal is enough to smear the name of the individual concerned. Moreover, the frequency of such scandals and their occurrence across the political spectrum leaves the public with the impression that the vast majority of politicians have a dishonorable past.

Such politicization of the lustration process is perhaps inevitable, but this tendency has arguably been exacerbated in Hungary because of the way in which lustration was designed and implemented. Three features of the law or the supporting legal framework are most relevant.

First, the absence of a generalized public disclosure of the files means that lustration has not allowed “closure” on the past, but rather new cases and accusations continue to come to light. Rumors abound that today’s politicians did serve as informers but that the Lustration Commissions were unable to find sufficient evidence. The lack of transparency of the commissions’ dispensation decisions fosters such rumors.

Second, and perhaps to some extent underlying the original decision to avoid a general public disclosure, is the fact that Hungarian legal culture affords privacy a high priority. According to Hungarian legal thinking, both citizens and public figures are entitled to a high degree of protection of their privacy, although public figures are, by virtue of their office, entitled to less protection. Some experts have even argued that it is unconstitutional to reveal information relating to ordinary citizens. This drive to protect privacy, especially in the case of ordinary citizens, has played a major role in the many debates on proposed amendments to the law as well as in reaching interpretations of how it should be applied. Even under the latest law, only limited information can be published, with the names of agents still protected from general disclosure. One implication of this approach is that potential benefits in terms of the moral cleansing of society remain out of reach.

Third, the fact that the law regulates only information relating to activity for the III/III means that today’s politicians remain vulnerable to accusations that they served in other directorates of the security services. Indeed, Prime Minister Péter Medgyessy was accused of having served as a top-secret officer for the III/II (counterintelligence) department of the security services shortly after being elected in June 2002; he did not deny it. More recently, in 2004, the president of Hungarian Public Radio was accused of the same type of activity. This continued uncertainty means that one of the main aims of the lustration law—to prevent the blackmail of contemporary politicians—has not been achieved.

Lustration has thus failed to provide transparency in the political sphere. Indeed, as Fowler points out, “sanctionless lustration” as in the Hungarian case, if successfully implemented, produces no more information for the public. In short, a Hungarian citizen still cannot be sure that a serving MP did not work for the communist-era security services in some capacity or another. The defining feature of Hungarian lustration—the decision to limit sanctions to the threat of disclosure—has also proved to be one of its key flaws. On the other hand, in some cases even where compromising information has been revealed (e.g., during the Danubegate scandal), voters later elected the candidate in question.

Perhaps one other reason why lustration in Hungary has failed to build trust in democracy or politicians is that it has been a very elite-focused measure. The individuals who underwent vetting were obviously drawn from the elite, but it was also primarily the elite that undertook the debate on lustration; ordinary people have seen only the scandals arising over the years. Only with the passage of the 2003 law has the wider public gained the opportunity to be more generally involved. Even then, given the time that has passed since the transition and the difficulty for the ordinary person of interpreting the files, it is not clear that the process will be much more inclusive or shed much more light on the past. In this respect, lustration in Hungary seems doomed to fail in any aims to perform a moral cleansing of society.

Yet the counterfactual cannot be known. The existence of the law may have deterred some former agents from taking on public positions; this effect cannot be measured but could be significant. It is also not clear that another form of historical justice—at least on its own—would have been preferable. Had a truth commission, for example, been selected, it seems unlikely that in such a politically divided society as Hungary the personnel with sufficient independence and credibility to ensure a valuable process could have been appointed. Thus while the lustration policy has had many flaws, it might not have been preferable to ignore lustration entirely. Rather, the pursuit of a combination of different instruments of historical justice might have been the most appropriate way to proceed.

Questions remain about how to handle the information gathered by the communist security services in future. Some experts argue that the best solution would be to open the archives and allow people to judge for themselves the guilt or otherwise of former agents. Unlimited access to the documents, permitting the exception only of documents compiled under the post-transition constitutional state, would provide a real opportunity to reveal the

past. At the same time it would serve the interest of the present especially in the case of participants in public life, since it would reveal what kind of interests (secret until now) may underlie or influence decision making. The opening up of all documents would also clarify for those who intend to serve in public office which acts will not be protected by the constitutional state.

Other experts would rather see all of the documents destroyed, or at least argue that the victims of surveillance should have ownership of the documents, to destroy, keep, or hand over to historians as they wish. On this argument, since the data were gathered illegally, it should be up to those affected to decide how the material is handled. However, still others argue that, now that the data exist, to destroy them would be to deny the role that they undoubtedly played in shaping history. The question is ultimately one that can be resolved only through the deliberations arising from the democratic process.

APPENDIX 1: LIST OF INTERVIEWS CONDUCTED

- 1 Zoltán Hodászi, judge serving on the Lustration Commission
- 2 István Sándorffy, legal representative of the Lustration Commission
- 3 Katalin Kutrucz, former deputy head of the Historical Office and deputy head of the new Archive established in 2003
- 4 András Gyekiczki, chief of cabinet at the Ministry of Interior (1994–98)
- 5 PM, former agent, whose collaboration was terminated at his own initiative
- 6 László Varga, Archive of Budapest
- 7 Vilmos Sós, philosopher, was under surveillance

APPENDIX 2: CHRONOLOGY OF KEY EVENTS

- 1989 *year-end* Danubegate scandal: press reports that contemporary opposition figures remained under surveillance and that the security services had been intentionally destroying files from the communist era
- 1990 *May* MDF–FKGP–KDNP government takes office
August Justitia plan published
October Demszky-Hack bill tabled
- 1991 *May* Government tables lustration bill
November Parliament starts to debate government bill;
Zétényi-Takács bill passed
- 1992 *March* Constitutional Court outlaws Zétényi-Takács bill
June Government withdraws lustration bill for revision
- 1993 *October* Government tables revised lustration bill and debate starts
- 1994 *March* Lustration law passed
April Three judges elected to first Lustration Commission;
parliamentary elections
July MSZP–SZDSZ government takes office
Fall Screening starts
December Constitutional Court outlaws some parts of the law;
sets September 30, 1995, as deadline for revisions
- 1995 *December* Government tables amendment
- 1996 *July* Amended lustration law passed (Act LXVII)
Fall Screening restarts under new legislation; Historical Office established
- 1998 *April* Government loses parliamentary elections
July Fidesz-MPP-led government takes office
- 1999 *June* Constitutional Court resolution (about 1996 law)
- 2000 *June* Amended lustration law passed (Act XCIII);
date when lustration law was originally supposed to expire
- 2002 *April* Government loses parliamentary elections
June MSZP–SZDSZ government takes office;
scandal breaks about new prime minister; Drafts T/541 and T/542 tabled
December New law passed (Act III/2003)
- 2003 *June* Constitutional Court resolution (about 2000 law)
- 2004 *December* Time allowed for lustration process extended once again

NOTES

- 1 The terms vetting and lustration are used interchangeably in this chapter to describe the screening process carried out for certain public officeholders to establish whether or not they had in the past collaborated with the communist security services.
- 2 Brigid Fowler, "'Democratic' but 'Demure': The Politics of the Hungarian Lustration Model" (unpublished manuscript), 13. Nevertheless, the constitution as interpreted by the Constitutional Court would later act as a constraint on the lustration policy adopted by Hungary.
- 3 The security services initially made reports on the number of files that had been destroyed, but this practice was subsequently dropped. Hence it is impossible to know how much information was lost.
- 4 Claus Offe, *Varieties of Transition: the East European and East German Experience* (Cambridge: Polity, 1996).
- 5 Letki further argues that lustration in East-Central Europe was never a matter of retro-active justice, "because it does not change the legal status of the past actions." Natalia Letki, "Lustration and Democratisation in East-Central Europe," *Europe-Asia Studies* 54, no. 4 (2002): 529–52.
- 6 John P. Moran, "The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?" *Communist and Post-Communist Studies* 27 (1994): 95–109.
- 7 Indeed, Linz and Stepan define the Hungarian communist regime as "mature post-totalitarianism." See Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore, MD: The Johns Hopkins University Press, 1996), 42.
- 8 Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 228.
- 9 Helga A. Welsh, "Dealing with the Communist Past: Central and East European Experiences after 1990," *Europe-Asia Studies* 48 (1996): 419–28.
- 10 Fowler, "'Democratic' but 'Demure,'" 18.
- 11 Kieran Williams, Aleks Szczerbiak, and Brigid Fowler, "Explaining Lustration in Eastern Europe: 'A Post-Communist Politics Approach,'" Sussex European Institute, Working Paper No. 62 (2003), 15.
- 12 Fowler, "'Democratic' but 'Demure,'" 10.
- 13 Williams et al., "Explaining Lustration," 16.
- 14 Cynthia M. Horne and Margaret Levi, "Does Lustration Promote Trustworthy Governance? An Exploration of the Experience of Central and Eastern Europe" (paper prepared for the Honesty and Trust Project, Collegium, Budapest, 2003), 5.
- 15 Gábor Halmi, "The Hungarian Approach to Confronting the Past" (paper delivered at the Seventh Annual Conference on the Individual vs. the State, 'Just Transitions': The Right to Justice and Truth in Transition, Budapest, May 7–9, 1999), 2.

- 16 Ibid., 1.
- 17 Although later the law's limited scope would be criticized, information about the structure of the security services was so scant in 1990 that the bill's drafters were unaware that Department III/III was only one branch of the security services. Demszky and Hack assumed that III/III represented the entirety, or at least the vast majority of the communist security services. Only later did it become clear that there had been at least four departments.
- 18 Top-secret officers were outsiders recruited to work for the security services as undercover agents; network members were informers registered as agents but otherwise pursuing their own lives and careers.
- 19 It is impossible to prove whether or not leaks would have occurred had Bill No. 482 not been passed. However, since such accusations later came up both in conflicts between the governing parties (MDF and the FKGP) and within the MDF, the rumor appears not to have been completely unjustified. Indeed Prime Minister József Antall was one of the first to use the documents for political means, threatening to reveal information about the pasts of FKGP politicians and culminating in "the envelope case," in which Antall gave FKGP leaders envelopes containing information about their own files. Péter Boross, then minister of interior, subsequently classified the former III/III documents as state secrets. The lustration law did not establish a system for the secure handling of the documents of the public security organizations. The statutory regulation for the security services required by the Constitution was made only in 1995, and even this law did not settle comprehensively the future of the information accumulated during the communist era.
- 20 "Career officers" were the regular staff of the security services.
- 21 The Left lobbied for inclusion of activities relating to membership of the Arrow Cross so that the vetting process would include right-wing as well as left-wing crimes.
- 22 It was indicated in the decision whether the commission had found something or nothing at all.
- 23 This attitude on the part of the MDF shows that, while the law would not have required individuals found to be on the register to resign, there was a widespread expectation that they would do so.
- 24 That is, a right to decide oneself about information relating to oneself.
- 25 Halmai, "The Hungarian Approach."
- 26 The Constitutional Court states in its 60/1994 (XII.24) adjudication: "the offence made on the right of (informational) self-determination demands that anyone can access the secret service data collected about oneself, that he can clarify the past regime's influence on his personal life to mitigate at least the offence made on his dignity of human being; it is equally important for the processing of the past that the secrecy of the former public security services will not continue."

- 27 See, for example, the following articles in *Fundamentum* 1 (2003): Péter Hack, "A szembenézés elmaradt," 92–101; János Kenedi, "A második paragrafus," 79–92; and László Varga, "Mit hozott a Jézuska," 73–79.
- 28 Constitutional Court Decision 50/2003 (XI. 5).
- 29 The NSC is always chaired by an opposition MP.
- 30 Two of the judges were called upon to resign because they had been involved in the decision making in cases convicting people for crimes related to the 1956 revolution, thereby contravening section 6 (1) of the lustration law.
- 31 For example, through discussions with archivists, historians, members of the so-called committee dealing with revealing documentation, MPs of the parliamentary National Security Committee who had worked on Report No. 3236 (1991), and also with former chief officers of the III/III.
- 32 Of the published decisions, only five related to individuals having served as agents. The remainder related to individuals who had received information from agents that they used in their work; this group was liable for vetting according to section 1(d) of the law.
- 33 The No. 6 card refers to a separate card held for every agent in the III/III register, containing the personal data of the agent, the time of joining and leaving the III/III, the name of the career officer with whom the agent was in contact, etc.
- 34 Including the name, personal data, and job description.
- 35 Except for a 1,000 HUF fine, which can be imposed, based on the Administrative Procedure Law.
- 36 *Népszabadság*, March 27, 2003.
- 37 After this date, a new archive was created.
- 38 It was common practice for people to decline invitations to attend a hearing or simply to fail to show up.
- 39 These criteria were set out in Act LXVII of 1996, although their basis was already regulated by the 1994 law.
- 40 This is in turn based on the opinion set out in the National Security Committee's Report.
- 41 This information is included in the Lustration Commission's final decision.
- 42 Anecdotal evidence suggests that blackmail was used less and less often over time, and by the 1980s it was much more usual to offer a reward for cooperation.
- 43 All of the information relating to these cases is taken from the decisions of the Lustration Commission.
- 44 On the grounds that they practice executive power and therefore "their previously performed activity which was against the rule of law and membership of an organization which was previously acting against the rule of law" shall be data of public interest.
- 45 EU Monitoring and Advocacy Program, *Monitoring the EU Accession Process: Judicial Independence* (Budapest/New York: Central European University Press, 2001), 194.

CHAPTER 8

Oppressors and Their Victims:
The Czech Lustration Law and the Rule of Law

Jiri Priban

In order to understand the different political and social functions of the lustration law in Czech society in the last decade, it is necessary to return to its principal rules, content, and political goals and the context of post-communist legal and political transformations. I shall therefore start with a historical and institutional background of the law and describe its content and main procedures. I then focus on the problem of the rule of law and legal continuity in a revolutionary situation. In the final part of this chapter, I shall move from descriptive to prescriptive methodology and seek to illuminate some moral, political, and legal “problems with lustration.”

General criticisms of the law often fail to distinguish between different groups of individuals affected by it and, like the statute itself, make no distinction between the communist oppressors and their victims. Contrary to these views and despite the lustration law’s justifications using the rule of law argument, I shall criticize the statute for its failure to distinguish oppressors and their victims. The law’s purpose to defend emerging public administration and democratic government has been compromised by the harms it caused to many innocent and brave individuals. I shall conclude with remarks on the complex nature of justice and the limits of legal means in dealing with the communist past and its crimes and injustices.

THE LUSTRATION ACT: HISTORY, CRITERIA, AND INSTITUTIONAL BACKGROUND

The Czechoslovak lustration law, as formulated in Act No. 451/1991 of the Collection of the Laws “determining some further conditions for holding specific offices in state bodies and corporations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic” (commonly referred to as the “large lustration law”) and Act No. 279/1992 of the Collection of the Laws “on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech

Republic and members of the Correction Corps of the Czech Republic” (commonly referred to as the “small lustration law” because it only extended the lustration procedures to the police force and the prison guards service), was based on the idea that post-communist Czechoslovak society had to deal with its past and facilitate the process of decommunization by legal and political means. It intended to specify a carefully selected list of top offices in the state administration that would be inaccessible to those individuals whose loyalty to the new regime could be justifiably questioned due to their political responsibilities and powers exercised during the communist regime.

Furthermore, the law also responded to the practice of “wild lustration” that had been going on since 1990. Before the first free parliamentary elections in 1990, all political parties except the Communist Party had their candidates “lustrated” despite the fact that the parties were not legally obliged to withdraw those with a secret police record from the ballot list. This practice only illustrates how strong the public pressure was to eliminate the risk of communist officials securing their power and influence in the new democratic condition. The lustration policy was introduced in the democratically elected Federal Assembly (Parliament) and, in March 1991, the Parliament’s internal “November 17 Commission,” which had been investigating the circumstances of the so-called velvet revolution and the secret police involvement in it, published the names of ten MPs who had a record in the secret police registers and refused to step down.¹ All these steps taken to clarify the status and past of new political figures plus political instability and the coup attempt in the Soviet Union in August 1991 subsequently motivated the federal government’s decision to draft a general lustration law.

The Federal Assembly enacted the law, on October 4, 1991. Act No. 451/1991 of the Collection of the Laws was drafted under the guidance of deputy Prime Minister Pavel Rychetský, who was politically affiliated with the Civic Movement, the center-left post-dissident stream of the former revolutionary Civic Forum.² The proposal had to achieve support in the Federal Assembly, which had already been politically fragmented and witnessed growing ideological and national tensions. Supporters of the lustration law therefore had to negotiate the draft and accept some one hundred amendments proposed in fourteen committees and during the plenary sessions. The law was eventually enacted by the vote of 148 deputies (49.3% of all members of the Federal Assembly) from twelve parliamentary factions stretching from the Christian Democratic parties and Moravian autonomists to the Hungarian nationalists and liberal MPs representing the Civic Movement and the Public Against Vio-

lence. The law could pass only due to the abstention of seventy MPs, which lowered the majority quorum.³

The law was based on the principle of person-by-person specific vetting and provided two lists of offices and activities to which it applied: the first listed offices requiring a lustration procedure before individuals could assume them; the second enumerated power positions held and activities performed during the communist regime that disqualified candidates applying for the jobs given in the first list. Individuals holding the jobs at the time had been subject to the lustration procedure as well.

Despite a wide range of public offices subjected to the lustration procedure, positions contested in the general democratic elections had not been affected by the law. Offices protected by the lustration law included: all ranks of the judiciary and the prosecution office; the civil service, rank of head of department and higher and senior administrative positions in all constitutional bodies; the army and police force positions of colonel and higher; all intelligence service specialized in political surveillance and persecutions (exceptions could be granted by the minister of interior on national security grounds); all management positions in the national bank, state media, press agencies, and state corporations or corporations in which the state is a majority shareholder; university administrative positions of head of academic departments and higher; and the board of directors of the Academy of Sciences.⁴

The disqualifying positions and activities during the former regime were linked to political bodies; repressive secret police, state security, and intelligence forces; and individuals collaborating with these forces.

Disqualifying political positions included: Communist Party secretaries from the rank of district secretaries upwards, members of the executive boards of district Communist Party committees upwards, members of the Communist Party Central Committee, political propaganda secretaries of those committees, members of the party militia, members of the employment review committees after the communist coup in 1948 and the Warsaw Pact invasion in 1968, and graduates of the Communist Party propaganda and security universities in the Soviet Union and Czechoslovakia. These jobs and memberships were assumed to constitute a risk for the post-1989 democratic regime. Exceptions were made for those party secretaries and members of the executive boards of the party committees holding their positions between January 1, 1968, and May 1, 1969, that is during the democratization period of the “Prague spring of ’68” terminated by the invasion of the Warsaw Pact armies in August 1968.⁵

Regarding the security, secret police, and intelligence service positions, the following were enumerated by the law: senior officials of the security police from the rank of departmental chiefs upwards, members of the intelligence service, and police members involved in political persecutions. Nevertheless, the law originally allowed the minister of interior, the head of the intelligence service, and the head of the police force to pardon those members of the former secret police whose dismissal would cause “security concerns.”⁶

The most controversial part of the law was that which listed the activities of citizens related to the secret police. They involved secret police collaborators of the following kind: agents, owners of conspiratorial flats or individuals renting them, informers, political collaborators with the secret police, and other conscious collaborators such as candidates for collaboration.⁷ This complicated structure corresponded to the system elaborated by the communist secret police. The main issue was whether a person consciously collaborated with the police or was just a target of secret police activity and possibly a nonintentional source of information gathered during police interviews.

It was often technically impossible to distinguish the two sides of one repressive organization—the secret police collaborators and their victims. At the same time, the government had to address the problem because the public was most concerned exactly about the possible damaging impact of secret police agents on the emerging democratic political process and institutions. In February 1992, the Independent (Appeal) Commission required by the law was created, the purpose of which was to review the issued positive lustration certificates⁸ in light of the reliability of available facts and gathered secret police records. The commission consisted of the following members: chair, deputy chair, and one member were appointed by the chair committee of the Federal Assembly (Parliament) and could not be members of Parliament; two members were appointed by the federal minister of interior from his staff; one member was appointed by the head of the intelligence service; one member was appointed by the minister of defense; six members were appointed by the chair committees of national parliaments (three members by the Czech National Council and three members by the Slovak National Council) and could not be members of the Czech or Slovak National Councils; and one member was appointed by the Czech minister of interior and one member by the Slovak minister of interior from their staff. Members appointed by the ministers and the head of the intelligence service had to be university law graduates.

The appointment procedure was a strange mixture of democratic elements (involvement of top bodies of the federal and national legislature), administrative hierarchical procedures (appointments within the executive branch of

constitutional power), and attempts to provide equal representation of both nations of the Czechoslovak federation at the time. The membership combined expert knowledge with lay elements. The appointment rules also show that the Czechoslovak and, later, the Czech lustration process was handled primarily by the executive branch of constitutional power, especially the Ministry of Interior, which set up a special bureau to administer the process of collecting the necessary data and issue the lustration certificates within its Security Office.

The category of secret police collaborators was divided into three subcategories: category A of “agents, informers, and owners of conspiratorial flats”; category B of “trustees,” who, though not classified by any of the activities listed in category A, were conscious collaborators; and category C, “candidates for collaboration,” who did not have to be necessarily conscious collaborators and often were just subjects of police surveillance and interrogation. The commission’s principal goal was to decide whether those accused of collaborating with the secret police actually had been conscious collaborators or just innocent victims of political persecution recorded in the secret police files.

THE LUSTRATION LAW IN ACTION

The categorization of secret police collaborators led to a number of political protests, moral criticisms, and legal cases. It was especially category C that became the subject of controversy and resulted in a number of legal complaints. By October 1992, the Independent (Appeal) Commission had reviewed a mere three hundred of the complaints, which was 11% of all the complaints submitted to the commission, and only in thirteen cases concluded that they were conscious collaborators with the secret police.⁹ No wonder that the commission’s chairman Jaroslav Bašta proposed the removal of this category from the statute. The Constitutional Court of the Czech and Slovak Federal Republic, which reviewed the lustration law’s constitutionality after ninety-nine members of Parliament complained to the court, eventually annulled this category.¹⁰

It is noteworthy that the court upheld the law’s constitutionality in general and stated that lustration in principle did not violate the International Convention on Civil and Political Rights, the International Convention on Economic, Social, and Political Rights, or the Discrimination Convention (Employment and Occupation) of 1958. Furthermore, the court declared unconstitutional and therefore void those sections of the law (sections 2(3) and 3(2)) that

legislated specific powers to the minister of defense and the minister of interior to exempt individuals from the lustration procedure if it was in the interest of state security. According to the court, these sections contradicted the principles of equality and due process of law guaranteeing that the same rules apply to those in the same position.¹¹

The staff handling the lustration process consisted primarily of administrative staff of the Ministry of Interior responsible for the protection of the communist secret police files. The position of the Independent Commission was specific because it was to deal with citizens' complaints within the framework of administrative procedure, before any judicial review, and on the basis of a rigorous and confidential fact-finding process. After the judgment of the Constitutional Court in 1992, which declared unconstitutional the incorporation of category C into the law, the commission's work became unnecessary and the body was dissolved. The lustration process subsequently became fully administered by the Security Office of the Ministry of Interior, which issues the lustration certificate. The certificate therefore is an administrative act against which a citizen can file an administrative complaint and even a civil suit.

Regarding the procedure, an individual has to apply for the lustration certificate at the Security Office of the Ministry of Interior. Any person can apply for the certificate and it is the ministry's duty to issue it. The certificate is mandatory only for those holding or applying for jobs listed in the lustration law. An organization can apply for lustration of its employees only if their jobs are subject to the lustration law. In the case of a "positive lustration" result, an applicant can file an administrative complaint with the ministry and, if the original finding remains unchanged, file a civil suit against the ministry demanding the protection of "personal integrity."

It is obvious that the law did not affect Communist Party members in general and, among communists, targeted only party officials and party militia members. Individuals who ended up with a "positive lustration" record stating that they had collaborated with the secret police could still be active in politics because the statute did not apply to any office or position contested in the general election. However, the overwhelming majority of political parties introduced a self-regulatory policy demanding all candidates to submit a "negative lustration" certificate before being listed in the parliamentary election. The only parliamentary political party refusing to internally apply lustration rules has been the Communist Party. The law thus created a situation in which members of Parliament and local councils could have a secret police record while, for instance, heads of different university departments would be subjected to the lustration procedure. Lustration did not apply to the emerg-

ing private economy sector, either. Private companies did not have access to the secret police files of its employees and therefore could not apply for “private lustrations.”

Available figures show that around 5% of all lustration submissions resulted in “positive certificates” disqualifying applicants from their office in the mid-1990s.¹² The most recent figures indicate a decline in “positive lustration” to approximately 3% of all applications received by the Ministry of Interior since the enactment of the lustration law in 1991. The ministry currently receives between six thousand and eight thousand lustration requests per year and the total number of lustration certificates issued between 1991 and 2001 was 402,270.¹³

Furthermore, the law had been originally enacted for a limited period of five years, but was subsequently extended by Parliament several times and is still being enforced in the Czech Republic.¹⁴ In 1996, the Parliament of the Czech Republic extended the enforcement of the lustration law until 2000, overriding a veto of President Václav Havel, who criticized the prolongation of the act as contradicting its original design as an exceptional, temporary, and revolutionary measure restricted to the early post-communist period and unsuitable for a stabilized democratic legal system. In November 2000, Parliament extended the law once again despite President Havel’s veto. The extended law introduced an exemption from the lustration process of persons born after December 1, 1971.

The prolongation of the law by the Parliament of the Czech Republic was widely criticized as contradicting its original purpose and spirit. One of the main justifications of the law at the time of its drafting, which emphasized only a temporary effect of its discriminatory measures, thus turned out to be false. Instead of the statute’s termination after the initial period of five years, the lustration rules have become an intrinsic part of the Czech legal system and were supplemented by further vetting procedures required in relation to NATO membership of the Czech Republic, which materialized in 1999. In June 1998, the Parliament therefore passed the Act of Protection of Secret Data, No. 148/1998 of the Collection of the Laws of the Czech Republic, which set up the National Security Office responsible for the protection of all secret data and vetting all individuals with access to them. The act de facto expanded the lustration law restrictions to other parts of the civil service and state administration because security checks, apart from security rules required by the NATO internal directives, involve the lustration process.¹⁵

The prolongation of the law was also addressed by the Constitutional Court in its judgment No. 9/2001Pl. US of December 5, 2001, in which the

court admitted that “the amendment of the lustration laws, which removed provisions about their restricted validity in time, was considerable intervention in their meaning.”¹⁶ Although the court insisted that the lustration law should be perceived as a temporary legislative measure, it also said that the law still protected an “existing public interest” and “legitimate aim, which is the active protection of a democratic state from the dangers which could be brought to it by insufficiently loyal and little trustworthy public services.”¹⁷ In other words, the “friend-enemy” political logic still persisted more than twelve years after the velvet revolution and the collapse of the Czechoslovak communist regime and justified extraordinary and temporary measures to protect the state administration. Nevertheless, the court’s ruling also emphasized that political circumstances change and the relevance of the lustration law decreases with the passage of time. It therefore is possible to imagine that a future constitutional complaint challenging the law might lead to a revision of the current position of the Constitutional Court.

As regards public reflections on the lustration process, a recent check showed that over 80% of the major Czech websites responding to the entry “lustration” are in fact advertising screening and security facilities for new and used cars. Fourteen years after the enactment of the lustration law by the Parliament of the Czech and Slovak Federal Republic, the matter of dealing with the communist past appears to be almost symbolically obliterated by the specific needs of a consumer society.

This image provided by the virtual reality of electronic media is underscored by opinion polls that indicate a steady decline of interest in dealing with the communist past and extending the lustration law.¹⁸ Nevertheless, this lack of public interest contrasts with intense activity in the Assembly of Deputies (lower chamber of Parliament of the Czech Republic) during the first half of 2003 when a group of communist deputies proposed abolishing the existing lustration law. The government refused to support the proposal; however, it went to the Assembly and, despite not having garnered a majority, the measure was supported by forty-eight deputies, some of them prominent social democrats.¹⁹ Although the Czech Social Democratic Party has always been rather lukewarm in its support for the lustration law, two smaller coalition parties backed the legislation and even threatened to leave the government if the law was abolished. Once again, parliamentary discussion of the lustration issues raised the problem of collective guilt, communist political crimes, human rights standards, due process of law, discrimination in the workplace, and so forth.

This contrast between the disinterested public and heated political debate illustrates the current state of the Czech lustrations very well. Opponents of lustration wanted to use the final stage of the European integration process of the Czech Republic to abolish the law on the basis of its discriminatory character, while the government, with a parliamentary majority of just two votes, realized that the whole issue was too risky for the fragile coalition and refused to abolish or substantially reduce the applicability of the existing lustration law.²⁰

THE LUSTRATION ACT AND “A DEMOCRACY DEFENDING ITSELF”

In Czechoslovakia, much like the revolutionary changes that took place in East Germany at the same time, the 1989 velvet revolution was an event governed by the political demands of constitutional democracy, civic rights, and the rule of law. It may therefore seem that the rule of law principle should have been enacted immediately after the power transfer. Taking seriously the minimum definition of the rule of law as the subjection of human conduct and especially political power to general laws, not individuals, one can see that the question of when the new political representation and democratically elected bodies are to unconditionally respect the principle of political equality (including the equal treatment of officials of the former totalitarian regime and its political organizations) becomes a key issue in any post-communist political society.

A democratic political community is constituted on the principle of equal treatment of all citizens before the law. However, the rule of law and liberal democracy cannot be reduced to the institutionalized world of legal principles, rules, and standards of human conduct. Principles and standards are inseparable from the social actors who observe and enforce them. Apart from its normative structure, every political and legal institution therefore must be examined in terms of those who act within its framework: individuals and social groups. Persons with decision-making and executive power can fundamentally determine the quality of political and legal processes. Every major political and legal change thus necessarily affects both normative structures and actors in the legal and political institutions.

Lustration therefore has to be taken as part of the broader politics of decommunization, which targets exactly the personal aspect of the whole process of post-communist political and legal transformations. It is based on the idea that some individuals cannot be trusted due to their position and

activities in the past regime and therefore should be excluded from access to certain public offices in the new democratic regime. In listing specific groups of people as banned from public offices, lustration gives evidence of the doubts and uncertainties accompanying the power transfer from communist rule to liberal democracy.

In order to understand the specific process of lustration, it is important to analyze the nature of political and legal changes in general. In Czechoslovakia, the revolutionary events of 1989 were typical of the logic of political conflict based on the concept of an “enemy”²¹ that needed to be neutralized and removed from power. The absence of any round table talks or power concessions before the outbreak of public protests in November 1989 resulted in the regime change being dominated by the revolutionary confrontation between “us/friends/revolutionaries” and “them/enemies/*nomenklatura*.” Communist officials and the secret police and its collaborators therefore could be quite easily labelled as “political enemies.”

This urge to purge the state institutions from individuals linked to the previous communist regime was still present, for instance, in the Judgment of the Constitutional Court of the Czech Republic No. 9/2001Pl US, of December 5, 2001, regarding the lustration law. Ten years after the enactment of the law, the court recalled the judgment of the European Court of Human Rights in the case *Vogt v. Germany*, which states that a democratic state is entitled to require of its bureaucrats that they be loyal to the constitutional principles on which it is based. In this regard it takes into account the experience in Germany during the Weimar Republic and during the bitter period that followed the collapse of this regime until the passage of the Basic Law in 1949. Germany wished to bar the possibility that these experiences would repeat themselves, and therefore established its new state on the idea of a democracy able to defend itself.²²

The court used the “democracy able to defend itself” argument in its judgment upholding the lustration law as a constitutional instrument requesting the political loyalty of civil servants and protecting the democratic regime against political threats. In this respect, the post-1989 Czechoslovak and German decommunization policies resemble each other because they both strongly demanded supplementing the institutional guarantees of the reconstruction of the democratic rule of law with necessary restrictive personal guarantees. They also used some notions and legitimization arguments elaborated during the post-1945 German denazification policy, which are briefly addressed below.

The idea of lustration is based on the belief that democracy is not only an impersonal mechanism for the reproduction of power in which law plays the role of a supreme regulative system, but also a matter of civil trust and loyalty. People must trust the new regime and the regime must trust its people. This would hardly be possible if old oppressors kept power in the new political situation. The danger of the persistence of old elites manifested its disastrous effects in ideological twists from international communism to ethnic nationalism and subsequent wars in the former Yugoslavia and some republics of the former Soviet Union. It was therefore necessary to satisfy the public expectations that the new power holders and civil servants would not threaten the authority of democratic political and constitutional institutions. The general principle of lustration was expected to strengthen the public trust and legitimacy of the new liberal democratic regime.

LUSTRATION AND OTHER FORMS OF "DEALING WITH THE PAST"

Despite its respect for democratic legitimacy as materialized in the general elections, the lustration law was nevertheless highly controversial because it compromised the first precondition of justice and the democratic rule of law—the equality of all before the law.²³ This equality was weakened because the very purpose of the lustration law was to administratively discriminate against specific groups of citizens by denying them access to public office. Instead of guaranteeing the equal treatment of every citizen of a political community by means of generally binding rules, some citizens were excluded from certain public offices in the new democratic regime due to their past political position and activities. Legislating the lustration law, the post-revolutionary power ended up in a serious conflict with its own revolutionary demand of the rule of law constituted by equality of all citizens before the law.

Assessing the lustration law, it is important to return to the analysis of the nature of the revolutionary changes in 1989 and early stages of post-communist legal and political transformations typical of the problems of decommunization and legal continuity. Every revolutionary change of a political regime calls for dealing with the political past.²⁴ Different ways of dealing with this past subsequently determine political, moral, and social developments of a specific political community in the revolutionary transition.

From the temporal perspective, revolutionary regime change is always stretched between the past and the future. At one end, there is the future full of expectations and hope. However, this future dimension is also unclear and

uncertain and comprises too many political possibilities, breaks, and unexpected turns. The primary goal of any revolution therefore is to stabilize its own future. At the other end, there is the past against which the revolutionary movement was targeted and set up its goals and demands. This past has to be rejected because it is “unjust,” “immoral,” “totalitarian,” and even “inhuman.”

During the revolution, dealing with the past affects the political system, but also the systems of education, public morality, and economy. It therefore comes as no surprise that the legal system also experiences a complex change driven by the revolutionary caesura, political regime changes, and the subsequent need to formulate legal rules and principles for the new social and political condition.

Political regime changes always involve a complex change of the system of positive law, and the legislature, under these revolutionary circumstances, must address the most general questions of legal continuity and discontinuity. In this respect, post-communist legal systems are typical of legal continuity and the method of fast enactment of new legal norms and regulations that gradually had to replace the communist legal system. This process was extremely dynamic and reflected revolutionary changes in the post-communist societies. This lawmaking effort, the goal of which was to change the nature of the system of positive law and adjust it to the new political and social conditions, obviously involved the politics of decommunization.

Legislation dealing with the past can then be divided into the two types of legislative acts: (a) *pragmatic*, purpose-oriented laws that confront the past by providing practical legal remedies for past injustices; and (b) *symbolic* laws that address general problems of political ideology and value-based political arguments. In reality, the post-1989 legislation dealing with the communist past always combined the pragmatic and symbolic functions. For instance, the most technical provisions, such as lustrations in state-owned industrial companies, had a symbolic value. Nevertheless, the distinction is useful because it helps to identify legislative acts with a direct legal effect and separate them from legislation that was primarily symbolic and intended to affect the sphere of public morality.

The distinction is also essential because post-communist Czech society did not follow the pattern of truth and reconciliation commissions in dealing with the past injustices in moral or quasi-judicial terms. Instead of public moral condemnation of the unjust political regime by an independent body, the Czech post-communist transformation was typical of Parliament using its legislative authority and creating the moral condemnation of the communist regime in the form of law itself. In 1993, Parliament thus enacted the Act

of Lawlessness of the Communist Regime and the Resistance to It,²⁵ which condemned the communist regime, made communist officials and their supporters responsible for its injustices, and praised those who resisted the communist political system. Although primarily drafted as a symbolic act, provisions incorporating the concept of “responsibility”²⁶ raised opposing hopes and fears in both camps of the emerging democratic system. Some right-wing politicians wanted prosecutions of political crimes to go ahead because they interpreted the law—especially its section 5 extending the period of limitations for crimes not prosecuted for political reasons between February 25, 1948, and December 29, 1989—as overturning the criminal law principle of period limitations. Some left-wing politicians even outside the Communist Party leadership feared that the law could lead to the politicization of criminal prosecution. Forty-one members of Parliament therefore submitted a complaint to the Constitutional Court and demanded that the law be declared unconstitutional and therefore void.

The Constitutional Court of the Czech Republic rejected the complaint and upheld the act’s constitutionality. At the same time, the court ruled that the act, especially its sections 1(2) and 5 incorporating the concept of responsibility and the criminal law period of limitation for prosecution, could not have any practical impact on the criminal law statutes and that the meaning of the concept of “responsibility” is moral, not criminal. The act thus could not open a way to establish criminal liability of former communist officials outside the framework of the criminal code. The court described the law as having primarily a moralizing purpose to mobilize public opinion and instigate reflections of the communist period of modern Czech history.²⁷

Instead of setting up some form of a truth and reconciliation commission, Parliament established itself as a “moral institution” dealing with the communist past and symbolically mobilizing its public condemnation by the enacted law. Another primarily symbolic attempt to deal with the past, yet with strong practical and criminal justice consequences, was the establishment of a special Office for Documentation and Investigation of the Crimes of Communism operating as part of the Ministry of Interior and, from January 1, 2002, as part of the Service of the Criminal Investigation Police.²⁸ The office was to continue the job of collecting and archiving information regarding the communist regime, which had previously been done by two other governmental offices—the Office for Documentation and Investigation of the Secret Police (StB) Activities of the Ministry of Interior and the Center for Documentation of Lawlessness of the Communist Regime of the Ministry of Justice (originally set up as part of the prosecution office). The office’s public moral task is to

map all injustices, atrocities, and crimes related to the communist regime and its officials. It is to archive past political injustices and crimes and thus create a memento for future generations. Apart from this moral job, the office also has a specific criminal justice task: filing cases and prosecuting individuals who still are subject to criminal liability. Its activity is therefore both historical and supportive of the system of criminal justice—symbolic and pragmatic.²⁹

The office's moral symbolic job was subsequently supported by the idea of publishing secret police registers and giving the public access to secret police files, which was inspired by the German legislation and coincided with the first extension of the lustration law. In 1996, Parliament therefore passed the Act of Public Access to Files Connected to Activities of the Former Secret Police, No. 140/1996 of the Collection of Laws of the Czech Republic. The law originally granted access only to persons potentially affected by secret police activities. Nevertheless, the statute was amended in 2002³⁰ so that the main registers of secret police collaborators could be made available to the general public.³¹ According to the current regulation, any adult person who is a citizen of the Czech Republic can file a request to access the secret police files and documents collected between February 25, 1948, and February 15, 1990.

The access, which is provided by the Ministry of Interior, therefore is not limited to the person's data and files. Nevertheless, the ministry protects the constitutional rights of personal integrity and privacy of other individuals who might be mentioned in the files requested by the applicant. The ministry therefore must make all information possibly affecting those constitutional rights inaccessible to the applicant unless it is related to the activities of the secret police and its collaborators. The applicant thus can access any details regarding the identity of secret police agents but would not be able to see information related, for instance, to their marital life or health problems. This shift of the state policy naturally resulted in a number of legal cases in which individuals demanded their names to be removed from the registers and their reputation reestablished.

Apart from these legislative acts supporting the construction of the democratic regime's political symbolism, laws with a primary purpose of practically benefiting the individual victims of communist injustices had been enacted by Parliament. They comprise especially the Act of Judicial Rehabilitation, No. 119/1990 of the Collection of the Laws, which legislated full rehabilitation of individuals unjustly prosecuted and imprisoned. The act reestablished full integrity and criminal law rehabilitation of those people and granted them financial compensation for the period of their imprisonment, the loss of jobs,

trial costs, and health harms.³² The state eventually paid three billion Czech koruna (approximately \$110 million) to the judicially rehabilitated citizens.

Other huge legal changes based on the notion of historical justice benefiting the victims of communist injustices were restitution laws. In the Czech Republic, the process of restitution eventually covered all physical persons or individual entrepreneurs whose property had been unlawfully confiscated by the communist regime. Persons entitled to restitution also included inheritors or family members of those whose property had been confiscated. The restitution process was based on natural restitution and financial compensation was provided only in those cases when it was impossible to return the confiscated property. Together with restitutions of property confiscated by the communist regime, restitutions of Jewish property (of both physical and moral persons) confiscated during the 1939–45 Nazi occupation were implemented by a special set of laws.³³

The politics of decommunization thus involved practical remedies benefiting the individual victims and legislative acts of primarily symbolic nature. The lustration law then constitutes a third pillar of the Czech decommunization policy based on the idea of practical measures necessary to protect the new democratic regime and temporarily eliminate potentially disloyal individuals from public administration. Nevertheless, the symbolic power of this practical purpose-oriented legislation has always been very strong and has become a cornerstone of all debates about decommunization and dealing with past injustices.

ROUND TABLE TALKS, THE RULE OF LAW, AND LUSTRATION

One of the main reasons that different countries incorporated different decommunization policies, including lustration laws, lies in the mechanism of round table talks. In individual countries of the former Soviet bloc, round table talks facilitated the transformation of the totalitarian systems into liberal democracies and transferred power to the new elites. These talks played a central role in countries such as Poland and Hungary, which were more liberal and reform-oriented than other communist countries. In fact, these countries experienced a much more evolutionary and gradual rather than revolutionary and sudden political change. Their period of political transition was more informed by the idea of negotiations and political bargaining. This gradual transfer of power is usually described as a process of regulated and self-limiting revolution.³⁴ For instance, the Hungarian political *rendszerváltás* (regime

change) was conducted entirely by constitutional acts and democratic procedures. The constitutional revolution in Hungary wished to avoid political divisions and establish new national unity. It was a transformation of communism into liberal democracy entirely controlled and shaped by the existing constitutional and legal framework.³⁵ Unlike the revolutionary changes in Czechoslovakia or the German Democratic Republic, the Hungarian transformation had the character of a constitutional amendment based on the idea of legislated regime change.

The round table negotiations in Hungary and Poland proceeded according to specific rules remotely resembling some procedures and principles of the rule of law. Unlike spontaneous actions of political resistance generated by crowds on the streets, the Polish and Hungarian way of dismantling the communist regime had the character of a transformation process in which the communist parties could actively participate. The communist parties thus could use the round table talks for pursuing their political interests and getting the best possible position in the emerging democratic contest, which was to be facilitated by the talks.³⁶

On the other hand, the fiction of the existence of the democratic rule of law in the round table talks was much weaker and could hardly play any fundamental role in Czechoslovakia and the German Democratic Republic, which underwent a more radical revolutionary transformation. In those countries, the round table talks merely channelled the revolutionary situation and guaranteed the peaceful character of the revolutionary change. Until the last minute, the Czechoslovak and East German communist leadership remained entirely rigid and without the slightest will to change the neo-Stalinist form of political rule. They persecuted political opponents, enacted repressive legislation, and organized political trials until the very end. Unlike Hungary and Poland, Czechoslovakia and East Germany experienced high political tensions and the revolutionary politics dominated by the concept of "enemy" had a bigger impact on the post-communist transformation in the 1990s. The idea of a self-limiting revolution was weakened and this weakness opened much more space for the radical politics of decommunization, including the lustration law.

Round table talks and the idea of political regime transformation as a change based on general principles of equal justice necessarily invoke the question of the temporal emergence of the rule of law in post-communist political societies. Until when do we still witness the totalitarian principle of socialist legality and when is it possible to talk about the democratic rule of

law? When is totalitarianism transformed into democracy and what role does the notion of the rule of law play in the process of decommunization?

There are no simple answers to these questions. Some lawyers, politicians, and legal scholars in post-communist countries supported the fiction that the very existence of negotiations at the round table talks already indicated the existence of the democratic rule of law, and that no discriminatory measures against the communist regime officials such as lustration would therefore be justifiable.³⁷ The claim that the rule of law had already existed at the time of transfer of political power from the Communist Party to the opposition could have a strong symbolic value and stabilizing effect during the period of gradual political transition. Nevertheless, it did not correspond to the reality of the 1989 revolutionary year in any country of the former Soviet bloc. On the one hand, the whole period of the 1990s is depicted as a time of creating the institutions of the democratic rule of law, their reconstruction, and adoption of specific legal and political institutions mainly from the West European democratic countries. The rule of law is not a real state of political society. It is its goal and regulative ideal. On the other hand, it is essential to adopt the principles of liberal democracy and the rule of law. It is therefore necessary to simultaneously reconstruct the rule of law and confirm its existence in post-communist societies. It is yet to be brought into existence, but must already be the guiding principle of political and legal transformation.

The rule of law is not a structure that can be instantly created by political decision and/or consent. It is impossible to perceive the rule of law as a political value the existence of which is determined merely by whether we believe in it or not. It is a highly complex structure of institutions, rules, and concepts that may take on a number of different forms and the reconstruction of which takes years and decades rather than weeks and months.

The problem of founding the democratic rule of law and determining the moment from which it is absolutely necessary to enforce it represents one of the most difficult problems of “transitional” legal and political theory. We are confronted by the question of when the rule of law principles have to be generally and unconditionally imposed. The judgments of the Constitutional Court of the Czech and Slovak Federal Republic (No. 1/1992Pl US) and the Constitutional Court of the Czech Republic (No. 9/2001Pl US) clearly show that the question has serious practical consequences and is not limited to the sphere of jurisprudence and political theory. It determines the extent and temporal limitation of enforcement of extraordinary, transitional legal measures such as the lustration law.

LUSTRATION AND LEGAL RETROSPECTIVITY

Apart from breaching the first principle of the rule of law—equal treatment of all before the law, the lustration law was also criticized for weakening the principle of legal certainty, encouraging the arbitrary use of law, and having retrospective effect. The principle of *lex retro non agit* certainly is a constitutive element of the rule of law and retrospective laws may weaken legal certainty. However, jurisprudence commonly describes retrospective legislation as a possible remedy for past injustices and a form of punishment for crimes that could not be prosecuted in the past for political reasons. Retrospective laws may partly compromise legal certainty by breaching time limitations of prosecution, but still represent an optimal way to reinstate justice and the rule of law.

The first example of retrospective justice can be taken from the famous appendix of Fuller's *Morality of Law*, in which the new government has to provide legal remedy and punish crimes caused by the previous tyrannical regime.³⁸ In fact, Fuller seeks to solve a problem that was haunting all post-communist governments: how to punish obvious crimes committed by the tyrannical regime if, at the time of their commitment and according to the regime's laws, they were not considered criminal acts and often had been in fact initiated by the regime's legislation. Fuller comes to the conclusion that despite the fact that the prohibition against retrospective laws is a constitutive principle of the rule of law, such laws may be used in exceptional circumstances if they support another constitutive principle of the rule of law—the principle that all crimes shall be prosecuted even if they may be treated as legal acts by a tyrannical power.

The second example of retrospectivity in law is Gustav Radbruch's formula, which favors the retrospective application of the suprapositive principle of equal justice in those circumstances when the law is in gross contradiction to the equal treatment of all. Radbruch reacted to the National Socialist regime and its horror policies executed by legal means and summarized his position in the following words: "The conflict between justice and legal certainty should be resolved in that the positive law, established by enactment and by power, has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as an 'incorrect law' [*unrichtiges Recht*] to justice."³⁹ The formula encouraged judges to resort to the justice argument in these extreme circumstances of conflicts between the positive law and suprapositive normative arguments of equality before the law.

The difference between the two examples is obvious: the first is based on

democratic legitimacy because the retrospective law is enacted by the democratically elected legislature, while the second example of Radbruch's formula facilitates judicial remedies of openly unjust laws in terms of natural justice. Although the democratic legislation's main advantage consists of clear sets of rules for punishment of past political crimes and just compensation, the judicial solution is more flexible because it empowers courts to consider the individual circumstances of each case and review it from the perspective of equal justice. Although both methods are distinctly retrospective, neither of them opens a way to the arbitrary use of power by judges or the legislature. They show that legal certainty is only one of many elements of the rule of law that does not automatically rule out any possibility of retrospective and even discriminatory legislation and judge-made law in transitional periods of reconstructing the democratic rule of law.

From the temporal perspective, the lustration law has the dual character of both prospective and retrospective legislation. The statute is prospective because it regulates conditions for future job and/or office applications. The law is retrospective in the sense that a number of actions and positions securing privileges in the past have become a ground for administrative discrimination in the present and future. It is not retrospective in the sense of criminal liability and therefore does not breach the principles of *nullum crimen sine lege* and *nulla poena sine lege*. Retrospective aspects in the lustration law, which demanded screening the political past of individual applicants, responded to the calls for political discontinuity and condemnation of the previous regime and its repressive practices. Prospective aspects responded to the calls for strengthening the political stability and security of the emerging democratic regime. No wonder that the European Court's formula of "a democracy able to defend itself," which was referring to the condition of the German Weimar republic, became popular in the post-communist judicial reasoning and was invoked to justify the extraordinary and temporary discriminatory means of the lustration law.⁴⁰

Lustration has to be treated rather as a controversial element of the emerging rule of law and not as its mere denial due to the retrospective elements incorporated in the lustration law. Nevertheless, the statute's controversy goes beyond the equal justice and prohibition of retrospective law debates and there are many conflicting views regarding its political and moral impact. Some critics even suggest that the law made the whole politics of decommunization much less effective.⁴¹ Let us therefore turn our attention to some of these moral, political, and legal problems surrounding the lustration law and its social impact.

EARLY CRITICISMS OF THE LAW AND THEIR WEAKNESSES

The political morality of liberal democracies contains one of the most frequent and agitating words—discrimination. Democratic political life is concentrated around the fight against any forms of discrimination and for emancipation of all citizens. People living under liberal democratic conditions are politically integrated by the concepts of equality and civil activism against inequalities. In this respect, lustration is a process going in the opposite direction and compromising the foundations of liberal democratic morality by its openly discriminatory character. Moral criticisms and arguments against the lustration law can be summarized as follows: you make certain groups of individuals second-class citizens because you prohibit them from access to public office; this contradicts the liberal democratic principle of open access to public office.⁴² Democracy cannot be founded on discrimination!

This argument was used in early criticisms of the lustration law by human rights campaigners and organizations, such as the U.S.-based group Helsinki Watch. In 1992, the group reported on lustration legislation and called on the Czechoslovak authorities to repeal the statute. In an article published in *The New York Review of Books*,⁴³ a former executive director of Helsinki Watch and senior advisor to Human Rights Watch depicted an atmosphere of suspicion and distrust in post-communist Czechoslovak society allegedly caused by lustration, and implicitly blamed the law for invoking the horror practices and “witch hunts” of the communist era.⁴⁴ Helsinki Watch even suggested alternative solutions as follows: “(1) set up an independent, non-governmental commission to investigate and report on abuses of the previous regime; (2) prosecute those responsible for actual crimes, on the basis of specific charges and with full due process protections; (3) assure that no prosecutions or other adverse actions against individuals—for example, in employment and education—take place solely on the basis of political association or party membership.”⁴⁵

Similar arguments basically treating the lustration law as part of the communist legacy and totalitarian practice, which creates an atmosphere of fear and police repression, are also typical of Tina Rosenberg’s famous book *The Haunted Land*, which won the 1996 Pulitzer prize for general nonfiction works.⁴⁶ Rosenberg admits that a transition from dictatorship to democracy must not be undermined and all necessary steps should be taken to create a new democratic and political culture. She doubts that communist repression could be the subject of ordinary criminal justice and due process of law because of the sheer number of cases and the portion of population involved

in them. Nevertheless, she keeps a fundamental moral position that lustration is morally repulsive and harmful due to its discriminatory and labelling effect and avoids basic questions about reasons, goals, and addressees of discriminatory measures.

Apart from this fundamental moral critique of the lustration law as discriminatory and therefore resembling communist past practices and undermining the democratic present, further criticisms pointed to the principle of collective responsibility, which creates a false impression that one can easily classify and distinguish oppressors from their victims. For instance, Václav Havel opposed the idea of publishing the names of all those with some form of secret police connection and feared that it could lead to new fanaticism and injustices. Although he emphasized the need to deal with the communist past, he wanted to do so with generosity, repentance, and a sense of forgiveness.⁴⁷ Yet, despite this call for a moralist solution, he eventually signed the lustration law and proposed several amendments to it.

Early criticisms often lacked sufficient knowledge of language, political and historical context, and even the real content and effect of the legislation. They therefore unsurprisingly caused negative responses even among human rights advocates and activists.⁴⁸ Ignorance of basic facts and general lack of knowledge is especially striking in the case of the Helsinki Watch's report and its alternative suggestions. In fact, Parliament established an independent investigation commission (November 17 Commission) as early as September 1990 and it was paradoxically this body that came up with the concept of lustration. The idea of prosecuting the "actual crimes" completely ignored the fact that many laws enacted by the communist regime actually had a criminal nature and therefore legalized otherwise criminal behavior. Taken as a general rule, the third suggestion that no adverse actions should be taken solely on the basis of political party membership would be one of the strongest accusations of the politics of denazification in postwar Germany and certainly would have been appreciated by all high-ranking Nazi officials who could not be prosecuted for any "actual crimes" and still had been the subject of employment discrimination by the post-1945 democratic regime.

Furthermore, the Helsinki Watch's critical report stated that the "law does not adequately guarantee a review of each case on an individual basis in a proceeding in which the accused is told the charges against him and is given sufficient opportunity to prepare a defence."⁴⁹ It has to be emphasized that lustrations are an *administrative law measure*. The "lustration certificate" is an administrative decision that states facts important for legal qualification for certain jobs in state administration and state-owned companies. The

lustration procedure is not judicial, which means that any review of the certificate's statement is primarily the subject of administrative process. Nevertheless, an applicant can go to the court and ask for a judicial review of the decision. This was also one of the reasons why the Independent (Appeal) Commission initiated a removal of category C from the law: the risks of legal actions against the Ministry of Interior were extremely high. Contrary to the criticism, judicial review of the lustration decisions is guaranteed by the law. Those who receive a "positive lustration" record can file a civil suit against the Ministry of Interior and demand their personal integrity to be restored in public. Cases are heard by regional courts, which otherwise commonly act as appeal courts in cases originally heard by the first instance district courts.

The Helsinki Watch's report was argumentatively weak, inconsistent, and failed to provide a thorough critique of the lustration law that would go beyond usual and decontextualized truisms. A similar example of such a hasty critical approach was an early decision issued by the Governing Body of the International Labour Organization (ILO) on March 5, 1992, which speaks about "more than one million people"⁵⁰ potentially affected and calls on the Czechoslovak authorities to "scrap or change" the discriminatory law allegedly contradicting the Discrimination Convention, 1958 (No. 111). After the subsequent exchange of reports between the ILO and the Ministry of Labor and Social Security of the Czech Republic, criticism was toned down and primarily focused on proportionality between the lustration demand in general and specific positions for which a job applicant is requested to have a "negative lustration" record.⁵¹

In contrast to these approaches, the Parliamentary Assembly of the Council of Europe, for instance, in principle admitted the compatibility of the lustration law with the democratic rule of law provided its aim is to protect the state and not to punish individuals.⁵² It is based on the distinction of discrimination and punishment and thus emphasizes the importance of the protective function of democratically enacted laws. Similarly, although the European Commission expressed some concern regarding the continuing enforcement of the law, the lustration process did not become an obstacle to the accession of the Czech Republic to the European Union.⁵³

The paradox of establishing the democratic rule of law by breaching one of its constitutive principles could hardly be fully understood if one simply considers the lustration law unjust because of its discriminatory character. This attitude draws on a broad picture in which the rule of law stands on the side of unconditional equality while the lustration law is compared to dark practices of the totalitarian past and condemned as contradicting the very concept of

liberal democracy. In such criticisms, the new regime is the subject of principal criticisms while all those subject to lustration are indiscriminately treated as victims. “Specific groups” are not specified at all and top members of the Central Committee of the Communist Party could be consequently depicted as powerless victims of “witch hunts” just three years after they had orchestrated the last round of political trials.

Some critics of the law also claimed that it incorporates the principle of collective guilt and responsibility unacceptable in the rule of law.⁵⁴ It is true that the law defines specific groups of individuals prohibited from certain offices and jobs. In this sense, the law has a generic effect and nobody can deny that it seeks to discriminate against the specified groups, though by administrative and not criminal law means. However, the law also incorporates the principle of individual will expressed by those affected by lustration (acceptance of a position or job within the party or secret police ranks, application to become a member of the party militia, even the most controversial consent to become a secret police collaborator, etc.). The law presumes that a person who individually decided to become part of the communist repressive institutions should be made responsible for this decision in the present. It is by no means a statute indiscriminately hunting for all communists and members of the secret police and using the principle of collective guilt, as suggested by early moral and legal criticisms. However, the law presumes that the very act of joining higher ranks of the Communist Party organization or repressive institutions, such as the secret police and the party militia, constitutes a solid ground of prohibition to take a job subject to the lustration procedure. Individuals are held *prima facie* responsible for their past political engagements.

The fact that the lustration law fell far short of banning all communists and communist policemen from access to public office is illustrated by the case of Pavel Příbyl, who had been in the antiriot police unit that brutally acted against peaceful anticommunist demonstrations in January 1989. In the 1990s, Příbyl had been briefly involved in business with other former communist police officials and subsequently established his political career in the Czech Social Democratic Party. In August 2004, he was invited by Prime Minister Stanislav Gross to take the job of head of the Prime Minister’s Office, which he accepted. It took two weeks of public protests and media criticism before the prime minister decided to take action and Pavel Příbyl resigned his position. The Příbyl case clearly shows that the private sphere has never been affected by the lustration law and that its provisions did not automatically classify all communists and police members as second-class citizens.

OPPRESSORS AND VICTIMS

Apart from the “friend-enemy” political logic dominating the early stage of the post-revolutionary legal and political transformation in Czechoslovakia, the post-revolutionary transformation also produced a much more complicated logic given by the fact that totalitarian systems had historically unique power to make all individuals more or less part of their machinery. In the moral sense, almost everyone was a perpetrator and a victim at the same time and therefore guilty of creating their own suffering. It means that everyone was *simultaneously* a “friend” and “enemy” of the communist state. This deep instability was subsequently transferred to the post-revolutionary political system and the public atmosphere, which heavily influenced the whole lustration controversy.

In any critique of the lustration law, it is therefore necessary to start by focusing on the personal aspect of the legislation and distinguishing two different groups of individuals: oppressors and their victims. It is one of the worst moral consequences and the biggest failure of the statute that it made both groups subject to the same lustration process and subsequent discrimination. Considering all those party officials, members of the party militia, and secret policemen, it is quite hard to find any sympathy for their past activities. The moral argument against administrative discrimination provided by lustration is significantly weakened when we actually look at the past records of the lustrated persons, the validity of which is beyond any doubt. Discriminating against those who had been responsible for discriminatory policy and political repression in the totalitarian past is morally justifiable even in the democratic condition.

However, the law is morally repulsive because it discriminates against many of those who had been subjected to the worst communist repression. A sadistic interrogator and her powerless victim, who had been forced to sign a statement of collaboration to protect her very life, had both been classified as persons dangerous to the new regime’s stability. A less emotional example would be a person who had been allowed to travel abroad as a student in the 1950s and, in return, agreed to provide information should she encounter any archive data relevant to state security. Forty years later, this person could be classified as a secret police collaborator and banned from any senior position at her university. Furthermore, individuals famous for their civil courage and resistance to the communist persecutions could end up with “positive lustrations” because the secret police forged its documents. The lustration law, which was to eliminate persons without political loyalty to the new demo-

cratic regime, failed terribly to reflect all these circumstances and, on top of that, exposed these regime victims to public humiliation. They were sacrificed so that the vast majority of society loyal to the previous regime for decades could feel morally purified and label all those responsible for their own “suffering.”

MODEL CASE I

Vladimír Mikule is associate professor of administrative law in the faculty of law at Charles University. Like hundreds of thousands of other citizens of Czechoslovakia after the 1968 invasion of the Warsaw Pact armies, he lost his academic job for political reasons. Being one of the most distinguished public law experts in the country, he remained in touch with other persecuted lawyers and academics and, though not a signatory himself, significantly contributed to drafting the Charta 77 petition and formulating its position in terms of legal and human rights standards.

For these obvious reasons, Mikule joined the Civic Forum movement during the 1989 velvet revolution and was co-opted to the Parliament. Soon, he became one of the MPs responsible for the legal design of democratic political reforms in Czechoslovakia. However, Mikule’s name appeared on the communist secret police list of collaborators. After the Parliament’s internal November 17 Commission threatened to disclose his record, Mikule decided to resign his parliamentary seat and left the world of politics in 1990.

However, Mikule never consciously collaborated with the secret police and fit under the category which was later, by the lustration law in 1991, classified as category C—candidate for collaboration. He was regularly interrogated by secret police officers, but never disclosed any information about political dissent or actively reported on his dissident friends. He even provided useful feedback to them by discussing his police interrogations with them. Mikule therefore continued his battle for personal integrity and his case became an inspiration for the Independent (Appeal) Commission to propose the removal of category C from the law—ultimately done by the Constitutional Court in 1992. Nevertheless, it took three more years before Mikule was finally cleared of any secret police collaboration in a civil suit before the court.

Although the story may be perceived as having a happy ending because category C was discarded as unconstitutional and Mikule eventually won his civil suit, he still finds it extremely traumatic and recollects his suicidal tendencies during the commission’s campaign against him in 1990. His life entirely changed once again after he was forced to leave politics, which he

joined briefly after two decades of communist persecutions. Today, Mikule continues teaching in the Charles University faculty of law, regularly briefs members of Parliament and governmental officials on legal issues, and enjoys a reputation as one of few Czech lawyers who can “draft a bill,” but his own political career was ruined by indiscriminate screening applied in Parliament before the enactment of the lustration law. He was one of the first victims of the screening process, but his expertise and legal activism also made him one of the most important winners, revealing social and moral damages that accompanied the enforcement of the lustration law.

The Mikule model case shows how the law hit hard among people affiliated with dissident activists and repressed by the communist regime. The only “guilt” of those people was that they resisted the regime and were put under surveillance by the secret police, which kept records leading to the “positive lustration” result. The communist secret police thus could ruin the personal lives of those people once again, long after it was dissolved.

In this case, the most serious objection is unreliable and insufficient evidence that harmed the victim, who subsequently had to take a long and painful journey to achieve justice and get his name cleared. However, it also shows that it was impossible to find formal criteria according to which a person could be judged on whether he collaborated with the secret police or not. Under difficult circumstances, pressured and blackmailed, some individuals chose to sign a formal act of collaboration with the secret police but never harmed anyone.⁵⁵ According to the lustration law, they were treated as secret police agents (category A) and shamed in public despite the fact that many of them were brave individuals and continued to be persecuted during the period of communism. Here, the law did not just open moral rifts in society, but led to moral catastrophe.

MODEL CASE II

One of the most publicized and high-profile recent cases has been that of Jiřina Bohdalová—a celebrity actress. She filed a lawsuit against the Czech Ministry of Interior and demanded her name be removed from the register of secret police collaborators. The trial revealed that in the 1950s, at the age of twenty-eight, she was psychologically tortured by secret police but never agreed to collaborate. She was temporarily prohibited from working for the state TV corporation, but was promised that, if she cooperated, her imprisoned father’s situation could be reviewed and her sister could study at the university. She was contacted twice a month but, according to the police records,

always was very cautious not to tell anything compromising. In 1961, the secret police decided to end its attempts to establish an active contact with the actress. Furthermore, Bohdalová never signed any official document except the most common statement of confidentiality. In January 2004, the municipal court of Prague ruled that she had never been a secret police collaborator, yet failed to oblige the Ministry of Interior to remove her name from the register. Nevertheless, the appeal court subsequently ordered the ministry to unconditionally delete the actress' name from the register.

So far, there have been only a few similar cases in which citizens registered in the communist secret police files demanded their names be deleted from the official register and their public integrity restored. In most cases, the courts ruled in favor of individuals and against the ministry.⁵⁶ It is likely that the publicity of the Bohdalová case will inspire other lawsuits against the ministry in which individuals might demand that it delete their records from the former secret police register.

Although the matter is only indirectly linked to the original lustration law, it nevertheless reflects the same problem of facing the "ghosts of the past."⁵⁷ Apart from civil lawsuits against the ministry, it also creates a more general problem of retrospective change of information archived by a state institution. A desirable process of restoring the constitutional right of personal integrity thus represents a fundamental problem for historians and political scientists because courts order the ministry to destroy historical data. Some historians consequently call for indiscriminate publication of all materials collected by the communist secret police, which would open a way for drawing a systematic map of the communist past and thus follow the example of Poland's Institute of National Memory.⁵⁸

The Bohdalová model case reveals a different dilemma of the lustration process and the policy of publication of secret police files. Unlike Mikule, Bohdalová had never been a dissident and later, after the 1989 velvet revolution, did not aspire to a political career or a position subject to the lustration procedure. Her name was disclosed only after enactment of the Act of Public Access to Files Connected to Activities of the Former Secret Police, No. 140/1996, which accompanied the extension of the lustration law and expanded this particular form of legal dealing with the communist past. Like the Mikule case, this case shows that an individual can succeed in a civil suit only after a tiresome and distressing legal battle and cannot avoid the dirty practice of being publicly labelled as a "secret police agent." Furthermore, a possible duty of the ministry to remove the name from official files is yet to be determined.

Those who defended the law usually emphasized that the process of wild lustrations had already been going on before the statute was enacted. According to this view, sooner or later public revelations would be made about all persons with a record and it was better to give it a legal form rather than leave it to journalists with good contacts in the Ministry of Interior.⁵⁹ Furthermore, the law's defenders argued that, though these individual stories and personal tragedies were regrettable, Czech society was politically too fragile and had to eliminate from access to state offices potentially disloyal individuals and persons who could be blackmailed because of their past records. Nevertheless, this purely purposive argument can hardly eliminate serious moral objections regarding the lustration law and publication of all secret police files and registers of collaborators.

From the perspective of fact-finding procedures and reliability of facts, the lustration statute has always been dubious because evidence against individuals comes from archives of the secret police. These archives are incomplete because the secret police managed to destroy many important documents and entire files. At the same time, the archives contain facts and information collected by the secret police itself and their reliability may therefore be questionable. The secret police was one of the most important pillars of the communist totalitarian regime described by the new democratic legislature as criminal and obviously could deliberately manipulate facts and create false evidence.⁶⁰ The new regime thus paradoxically had to presume that all available police materials were correct and reliable unless proved otherwise. Supporters of the law can hardly dispute this principal "factual" objection against lustrations.

Moreover, the problem of unreliability of the facts collected by secret police often benefits individuals who may have dubious pasts but keep good contacts with communist secret police officers who now willingly testify in their favor before the courts.

MODEL CASE III

Jiří Černý is a politician for the Christian Democratic Union–Czech People's Party [*Křesťanská a demokratická unie–Československá strana lidová*] (KDU–ČSL) and holds the position of deputy mayor in one of the Brno city districts. He was reportedly registered as a secret police agent in 1979 and received money for his information. People in regular contact with Černý were suspicious of his possible role as a secret police agent in the 1980s. Furthermore, journalists have recently discovered his connection with Luděk Lhotský in 1985, which

had likely been reported by Černý to the police and recorded on Lhotský's secret police file. Nevertheless, Černý was cleared by the court, which did not know about the incident at the time of the trial; it ruled that he was registered as a secret police agent, but there was no evidence that he truly acted as one. During the hearing, Černý used a former secret policeman, Martin Valehrach, as his key witness, who testified that he had invented the whole file and the list of Černý's paid activities.

It is a controversial, yet common practice that former secret policemen often testify in the lustration lawsuits before the Czech courts in support of those registered as secret police agents. For instance, Valehrach testified in another lawsuit of Jan Pavlík, who was dean of the faculty of arts of Masarykova University in Brno. Pavlík similarly argued that, though registered, he never acted as a secret police agent and Valehrach supported his claims.⁶¹ Controversies surrounding the reliability of evidence thus extend from the primary administrative process of lustration to its judicial review.

The lustration lawsuits therefore did not eliminate the whole controversy of fact-finding lustration procedures and, by relying on evidence given by former secret police, rather echoed early lustration debates and the argument that the law paradoxically preserved the communist secret police's influence in the post-communist democratic situation.

CONCLUSION: LUSTRATIONS AND THE PARADOXICAL CONCEPT OF TRANSITIONAL JUSTICE

The lustration law could not separate victims from their oppressors; as a result, its moral and symbolic effect was extremely controversial. The law therefore failed as moral dealing with the political past as proposed by some of its supporters.

In the undifferentiated post-revolutionary condition, the Czechoslovak lustration law's purpose was to protect the emerging political system and its rule of law by the paradoxical strategy of discrimination. This paradox should not be exaggerated and condemned from the fundamental perspective of democratic political morality because it is easily detectable in a number of political transformations from totalitarianism to liberal democracy.

In the beginning of the 1990s, no post-communist country had an established system of the rule of law but the countries with more evolutionary and gradual changes were much more affected by the fiction of the democratic/legalist revolution, which defused an outright confrontation with the past

regime at the level of criminal law and administrative discrimination.⁶² On the other hand, Czech society and its new political elites had been much more reluctant to accept such a fiction. This political attitude facilitated the enactment of the extensive lustration statute with all its intrinsic controversies and contradictions.

The lustration law fulfilled its role as a filter separating former political enemies from new democratic institutions and, contrary to the claims that the statute had instigated an atmosphere of fear and suspicion, contributed to the stabilization of Czech post-communist society in its early stage of transformation.⁶³ It contained the process of wild lustrations and reduced social anxiety and uncertainty regarding new political elites. However, the law's impact on dealing with the communist past and *moral effects* were largely negative because the lustration process handled by state bureaucrats paradoxically inhibited public discussion of the totalitarian past, its political impact, and responsibility. The instrumental dealing with the past by legislation contributed to the marginalization of moral issues of the political past during the 1990's.

At the same time, the lustration's power to isolate the old political enemy helped to petrify the antiregime ideology and unreformed leadership of the Communist Party, which builds its popularity on political populism and antiregime feelings. The law's *political effects* therefore are as controversial as the legal ones. The lustration statute and other laws attempting to legislate against the communist past have created strong political opposition and old enemies reproduce their mutual distrust and animosity. Lustrations are one of the reasons why old regime supporters keep their old ideological and political positions and operate as an antiregime element in the new conditions of liberal democracy. In the regions of former East Germany and the Czech Republic, communists continue using the ideology of political extremism. It is both evidence of their rigidity and a consequence of the strict politics of decommunization.

The lustration law paradoxically initiated the process of "building civil equality by discrimination." The future equality was to be achieved by temporary discrimination against those defined by the legislature as temporary threats to the emerging regime. From the legal perspective, the lustration law represents an example of *transitional legislation*. Despite all objections and doubts accompanying its enactment, the lustration law, taken from the perspective of jurisprudence, is not so exceptional because no reconstruction of the democratic rule of law proceeds in a purely principled and dogmatic

environment. The reconstruction is typical of contradictions, compromises, and logically paradoxical solutions. Examples from postwar Germany and its denazification politics, post-apartheid South Africa, and the decommunization politics of other post-communist countries indicate that reconstructive legal and political efforts produce both principles and paradoxes.

NOTES

- 1 For details, see Jan Obrman, "Laying the Ghosts of the Past," *Report on Eastern Europe*, no. 24 (June 14, 1991).
- 2 It is noteworthy that Pavel Rychetský joined the Czech Social Democratic Party in the 1990s, served as minister of government led by social democrats, and currently holds the position of chair of the Constitutional Court of the Czech Republic.
- 3 See František Cigánek, *Kronika demokratického parlamentu 1989–1992* (The Chronicle of democratic parliament 1989–1992) (Prague: Cesty, 1992), 188. Quoted in Kieran Williams, Aleks Szczerbiak, and Brigid Fowler, "Explaining Lustration in Eastern Europe: 'A Post-communist politics approach,'" Sussex European Institute, Working Paper No. 62 (2003), 16.
- 4 See para. 1, sections 1–5 of Act 451/1991 of the Collection of the Laws.
- 5 *Ibid.*, para. 2, section 1(d)–(h).
- 6 *Ibid.*, para. 3, sections 1 and 2. The sections were later declared unconstitutional by the Constitutional Court of the Czech and Slovak Federal Republic due to their inconsistency with the principle of equal treatment. See note 16.
- 7 *Ibid.*, para. 2, section 1(b) and (c).
- 8 The certificates were issued by the Ministry of Interior to indicate collaboration with secret police of the communist regime.
- 9 Quoted from the Judgment of the Constitutional Court of the Czech and Slovak Federal Republic, No. 1/1992Pl US, 28.
- 10 For specific cases, see especially Jiřina Šiklová, "Lustration or the Czech Way of Screening," in *The Rule of Law after Communism*, ed. Martin Krygier and Adam Czarnota (Aldershot: Ashgate Publishing, 1999), 248–58, especially 249–51.
- 11 See the Judgment of the Constitutional Court of the Czech and Slovak Federal Republic, No. 1/1992Pl US, 2, 26ff.
- 12 As Kieran Williams points out: "[F]rom 1991 to 1997, if one includes the lustrations also required by the law on police service, a total of 303,504 screenings took place, of which 15,166 (5%) resulted in positive certificates." Figures had been provided by Jan Frolík, then director of the Czech Interior Ministry's Section for the Protection of Official Secrets, in Prague on February 11, 1998. See Kieran Williams, "A Scorecard for Czech Lustration," *Central Europe Review* 1, no. 19 (November 1, 1999).
- 13 In 2001, the Ministry of Interior received 6,770 lustration requests (7,280 requests in 2002), out of which 2.5% did not receive confirmation of a clear record. For details, see U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Czech Republic: Country Reports on Human Rights Practices—2001, March 4, 2002, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8243.htm>; for update, see U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Czech Repub-

lic: Country Reports on Human Rights Practices—2002, March 31, 2003, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18361.htm>. No data are available regarding the job description, gender, age, or qualification of lustration applicants. There are also no general records related to the subsequent careers of the lustrated individuals, their employment, etc.

- 14 Slovakia is an example of the opposite approach because, after the split of the Czech and Slovak Federal Republic, Vladimir Mečiar's populist Movement for Democratic Slovakia and other parties of his coalition government ignored the lustration law. Although the law was favored by the majority of the Slovak population (see Šiklová, "Lustration," 251) in the early 1990s, politicians opposed the law for many reasons, one of them being strong indications that Mečiar himself was a secret police collaborator. The Slovak lustration history is full of rumors, disappeared secret police files, and uncertainty. Political instability in Slovakia throughout the 1990s, especially under the Mečiar government between 1994 and 1998, is sometimes used as an example of a failed policy of decommunization caused also by the fact that the Slovak government did not pursue lustrations. See, for instance, Mark Gillis, "Lustration and Decommunisation," in *The Rule of Law in Central Europe*, ed. Jiri Přibán and James Young (Aldershot: Ashgate Publishing, 1999), 56–81, at 71–72.
- 15 For further details, see Vladimír Mikule, ed., *Zákon č. 148/1998Sb o ochraně utajovaných skutečností a o změně některých zákonů* (Act No. 148/1998Sb, regarding the protection of secret data and change of some laws) (Prague: Codex, 1998).
- 16 Judgment No. 9/2001Pl US, referred to as the Lustration Law Case II, 15.
- 17 Ibid., 20.
- 18 "Dealing with the communist past" is considered a less important problem when compared with other social issues, such as "crime and security," "unemployment," "health," and so on. See the survey by the Center for Public Opinion Polls (CVVM), December 3, 2003. At the time of the extension of the lustration law in 2000, Parliament's decision was favored by 36% of the population while 33% were strictly opposed to the decision. Left-right political differences were illustrated by the fact that prolongation of the law was supported by 59% of supporters of the neoconservative Civic Democratic Party, which was in opposition at that time. See the press release, "Veřejnost k lustračnímu zákonu" (Public views of the lustration law) by Institut pro výzkum veřejného mínění (Institute for Public Opinion Surveys) of May 29, 2000.
- 19 See, for instance, "Další kolo boje o lustrace" (Another round in the struggle over the lustration law), *Lidové noviny*, June 19, 2003, and "KSČM se nepovedlo zrušit lustrace" (The Communist Party did not succeed in abolishing the lustration law), *Lidové noviny*, June 26, 2003. The Communist Party proposal drafted by a communist deputy, Vojtěch Filip, was supported by individual members of the Czech Social Democratic Party and

- top state officials, including deputy Chair of the Assembly of Deputies Jitka Kupčová, Minister of Cultural Affairs Pavel Dostál, and former government ministers Jan Kavan, Petr Lachnit, and Jaromír Schling.
- 20 The chair of the Union of Freedom party and deputy Prime Minister Petr Mareš made a public statement that the party would leave the coalition if the law were to be abolished by a common action of social democrats and communists. The law was also supported by the major opposition party, the right-wing Civic Democratic Party. See “Další kolo boje o lustrace.”
 - 21 See Carl Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 1963).
 - 22 Judgment of the Constitutional Court No. 9/2001Pl US, 17.
 - 23 See, for instance, Ronald Dworkin, “Why Liberals Should Care about Equality,” in *A Matter of Principle* (Oxford: Oxford University Press, 1985), 205–13.
 - 24 One must add that every “dealing with the past” involves “undealing with the past” and every “politics of memory” is accompanied by “politics of imposed forgetting.” The best example is probably Cicero’s speech in the senate two days after the assassination of Caesar, when he called for *oblivione sempiterna delendam* (eternal oblivion of the act). This politics of forgetting has always played an important part in international politics and was incorporated, for instance, in the 1923 Treaty of Lausanne.
 - 25 Act No. 198/1993 of the Collection of the Laws of the Czech Republic. In this context, it is noteworthy that the National Council of the Republic of Slovakia (Parliament) enacted a similar law on March 27, 1996. It uses a language very similar to the Czech law and was not challenged before the Constitutional Court of Slovakia. For details, see the Act of Immorality and Lawlessness of the Communist Regime, No. 125/1996 of the Collection of the Laws of Slovakia.
 - 26 See Section 1, para. 2 of Act No. 198/1993.
 - 27 The court considered the complaint submitted by forty-one members of the Parliament of the Czech Republic at its plenary session on December 21, 1993, and rejected it. For details, see the Judgment of the Constitutional Court of the Czech Republic, No. 14/1994 of the Collection of the Laws regarding the abolishment of the Act of Lawlessness of the Communist Regime and Resistance to It, No. 198/1993 of the Collection of the Laws.
 - 28 The office was set up from two different administrative offices under the Ministry of Interior on January 1, 1995.
 - 29 For further details, see Jiri Přibáň, “Constitutional Justice and Retrospectivity of Laws in Postcommunist Europe,” in *Systems of Justice in Transition: Central European Experiences since 1989*, ed. Jiri Přibáň, Pauline Roberts, and James Young (Aldershot: Ashgate, 2003), 29–49, at 32–33.
 - 30 See Act No. 107/2002 of the Collection of Laws of the Czech Republic amending Act No. 140/1996.

- 31 These registers are available at <http://www.mvcr.cz/seznamy/index.html>.
- 32 See section 23 of Act No. 119/1990Sb.
- 33 The restitution process started as early as 1990 and was originally regulated especially by Act No. 403/1990Sb on “restitution of physical and private moral persons” and Act No. 427/1990Sb on “transfer of state property to other moral and physical persons.” Church property restitution was based on the state’s discretionary policy of “property listed for restitution” that, unlike restitution of physical persons, lacked any general restitution formula; it was regulated for instance by Act No. 298/1990Sb and Act No. 338/1991Sb on “property of religious orders and congregations.” Agricultural land restitution was regulated by Act No. 229/1991Sb and Act No. 93/1992Sb on “land restitution.” Jewish property restitution was regulated separately, for instance, by Act No. 212/2000Sb on “compensation of Holocaust property injustices.”
- 34 See, for instance, Jiri Přibán, *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality and Contemporary Version of the Social Contract* (Aldershot: Ashgate, 2002), 88–90; Andrew Arato, *Civil Society, Constitution, and Legitimacy* (London: Rowman & Littlefield Publishers, 2000).
- 35 Ralf Dahrendorf, *Reflections on the Revolution in Europe* (London: Chatto & Windus, 1990). See also Přibán, “Constitutional Justice,” 38–40.
- 36 Analyzing the round table talks in post-communist Central and Eastern Europe, Jon Elster distinguishes four different actors—conservatives and reformers within the communist parties and moderates and radicals within the opposition groups. While all four groups were detectable in the Polish round table talks, the Hungarian talks, according to Elster, involved merely three actors—conservatives, reformers, and the undifferentiated opposition. On the other hand, countries experiencing much more revolutionary changes, such as the former German Democratic Republic and Czechoslovakia, typically had one main actor—revolutionary masses of people supporting the radical transformation demands of the revolutionary opposition groups. See Jon Elster, *The Round Table Talks in Eastern Europe* (Chicago: University of Chicago Press, 1995).
- 37 In Poland, one of the supporters of this idea of the “democratic revolution,” which rules out any chance of retrospective legislation as unjust and contradicting the existing rule of law, is Ewa Letowska. For her general views, see Ewa Letowska and Janusz Letowski, *Poland: Towards the Rule of Law* (Warsaw: Scholar, 1996).
- 38 See Lon Fuller, *Morality of Law. Revised Edition* (New Haven: Yale University Press, 1969).
- 39 The translation is from Robert Alexy, “A Defence of Radbruch’s Formula,” in *Recrafting the Rule of Law: The Limits of Legal Order*, ed. David Dyzenhaus (Oxford: Hart Publishing, 1999), 15–16. However, I have changed the translation of *unrichtiges* from “false” to incorrect, as suggested by Panu Minkkinen. I prefer Minkkinen’s translation to the expression “unjust law” used in older translations of Radbruch’s legal philosophical texts. See, Panu Minkkinen, *Thinking Without Desire: A First Philosophy of Law* (Oxford: Hart, 1999),

41. Alexy himself uses the concept of correctness in the following parts of his chapter on Radbruch's formula.
- 40 See the European Court of Human Rights' judgment *Vogt v. Germany* as cited in Judgment No. 9/2001Pl US of the Constitutional Court of the Czech Republic, 17.
- 41 For early concerns about the law creating moral rifts and labeling the innocent victims, see Jiri Pehe, "Parliament Passes Controversial Law on Vetting Offices," *Report on Eastern Europe* (October 25, 1991): 4–9, at 9.
- 42 For this guarantee, see John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), 60–61.
- 43 See "Witch Hunt in Prague," *The New York Review of Books* 39, no. 8 (April 23, 1992).
- 44 See especially Jeri Laber's reply to critical responses in *The New York Review of Books* 39, no. 11 (June 11, 1992).
- 45 Human Rights Watch, *Human Rights Watch World Report 1993* (New York: Human Rights Watch, 1993), <http://www.hrw.org/reports/1993/WR93/Hsw-03.htm>.
- 46 Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (New York: Vintage, 1995).
- 47 See, for instance, Havel's speech at New York University published as "Paradise Lost" in *The New York Review of Books* 39, no. 7 (April 9, 1992).
- 48 Christine Stone and Mark Almond, two campaigners for the British Helsinki Human Rights Group, a controversial British-based human rights body, critically responded to the article and questioned the author's familiarity with facts. They pointed out that the "very term 'witch hunt' is a misnomer in this context: unlike witches and unlike the subversives who, in Senator McCarthy's febrile imagination, peopled the State Department, members of the Politburo and secret policemen did exist in Czechoslovakia between 1948 and 1989." Using available figures at the time, they also questioned the author's misleading depiction of the grand scale of the lustration process. For details, see Christine Stone and Mark Almond, "Human Rights in Prague," Letters to the Editor, *The New York Review of Books* 39, no. 10 (May 28, 1992). Jacques Rupnik, otherwise skeptical commentator on the Czech dealing with the past, also comments that these "comparisons say more about fears and fantasies concerning Central Europe as seen from New York than about the actual issues in post-communist Bohemia." See Jacques Rupnik, "The Politics of Coming to Terms with the Communist Past," *Transit: Europäische Revue*, no. 22 (2002).
- 49 Human Rights Watch, *Human Rights Watch World Report 1993*.
- 50 Compare with the actual number of just over four hundred thousand people lustrated during the first decade of the law's existence, out of which approximately 3% received "positive lustration" certificates. See "The Lustration Law in Action" section of this chapter; Williams, "A Scorecard for Czech Lustration"; and U.S. Department of State, *Country Reports 2001 and 2002*.

- 51 For the criticism, see the Report File No. GB.252/16/19. Quoted from the Judgment of the Constitutional Court No. 9/2001Pl US, 2.
- 52 See Resolution No. 1096(1996), point 11, of the Parliamentary Assembly of the Council of Europe.
- 53 In one of its regular reports on progress towards accession, the European Commission only says that in “September 2000 the ‘Lustration Law’ that excludes from public service posts (but not from political offices) members of, and persons who cooperated with, the former State Security Service was amended in order to extend its provisions until the new Civil Service Act is approved. It is important that this deadline for phasing out the lustration measures be respected.” See European Commission, *Regular Report on the Czech Republic 2000* (Brussels: European Commission, November 8, 2000), 18.
- 54 See, for instance, Havel, “Paradise Lost.”
- 55 Apart from many other examples, the most famous are probably the cases of the late Cardinal František Tomášek, protest songwriter and singer Jaromír Nohavica, director Arnošt Goldflam, artist and activist Joska Skalník, persecuted rock musician Mejla Hlavsa, and famous writer and publisher Zdena Salivarová who decided to publish a volume of collected personal stories of “secret police collaborators.” See Zdena Salivarová, *Osočeni: Pravdivé příběhy lidí z Cibulkova seznamu* (Accused: true stories of people from the secret police lists) (Brno: Doplněk, 2000).
- 56 In an interview, Martin Valehrach, a judge of the Prague City Appeal Court who has been dealing with lustration lawsuits since the mid-1990s, said that 70% to 80% of the lustration cases are won by individuals listed in the register. See “Jak česko přichází o agenty StB” (How Czechia loses its secret police agents), *Mf Dnes*, August 18, 2004, section C, 6.
- 57 For further details, see “Bohdalová vyhrála spor s vnitrem” (Bohdalová won her lawsuit with the Ministry of Interior), *Lidové noviny*, January 21, 2004.
- 58 See “Všechno zveřejněme! říká archivář” (Let us publish all data! says an archive expert), *Mf Dnes*, August 18, 2004, section C, 6.
- 59 The wild lustration practice was typical of an initiative of the Anticommunist Alliance, which was established in 1992; led by Petr Cibulka, a former dissident and political prisoner, it published the lists of secret police collaborators illegally in the periodical *Rudé Krávo* (Red Cow). Cibulka and his people acquired the secret police registers illegally from the new intelligence service. For the lists, see *Rudé Krávo* (the title phonetically resembles “Rudé právo,” the daily published by the Communist Party of Czechoslovakia) 2 (1992), nos. 32, 33, 34, 38. These lists are now available in book form.
- 60 It is important to mention that politically motivated manipulations of the secret police and intelligence service files continued after 1989 and even affected the U.S. presidential campaign when the Czechoslovak counterintelligence turned over material to the Bush presidential campaign on Bill Clinton’s visit to Prague in 1970 with the intent to

discredit him. At that time, Clinton visited a classmate whose parents had secret police records as agents. See *Czech Intelligence Tried to Blacken Clinton*, Teuter Library Report, January 8, 1994. Quoted in Herman Schwartz, "Lustration in Eastern Europe," *Parker School Journal of East European Law* 1 (1994): 141–71, at 145.

61 For further details, see "Jak Česko přichází o agenty StB." 6.

62 In this context, it is important to mention the failure of the lustration process in Poland in 1992. It was caused by an unusual decision of the Polish Parliament that, unlike the Czechoslovak method of "statutory lustrations," chose the method of a mere resolution of the Sejm (the lower chamber of Parliament) asking the Polish government to put lustrations within its administrative powers. This method was lacking a statutory legitimation and was criticized by many human rights organizations and other constitutional bodies, and the Constitutional Tribunal eventually declared it unconstitutional and void. Meanwhile, lustrations initiated a political crisis and Prime Minister Olszewski was forced to resign. For details, see, for instance, Wiktor Osiatynski, "Agent Wałęsa?," *East European Constitutional Review* (Summer 1992): 28–30.

63 See Gillis, "Lustration and Decommunisation," 81.

CHAPTER 9

The Shield, the Sword, and the Party:
Vetting the East German Public Sector

Christiane Wilke

INTRODUCTION

The German Democratic Republic (GDR) celebrated the fortieth anniversary of its founding on October 7, 1989, shortly before its fall. Enthusiasm-on-demand dominated the official part of the celebration. But at the same time, the “people’s police” and police troops of the infamous Ministry of State Security [*Ministerium für Staatssicherheit*] (MfS, popularly called Stasi) clubbed down and arrested scores of protesters. The physical violence that was briefly unleashed in the repression of the Fall 1989 demonstrations was rather untypical for the GDR: the “leading role” of the Socialist Unity Party [*Sozialistische Einheitspartei Deutschlands*] (SED) was mostly secured through more subtle and bureaucratized mechanisms. After the breakdown of the SED-dominated regime, how should responsibility for the injustices committed be conceptualized? Many had upheld the regime in morally reprehensible ways, but only few had committed obvious crimes. Vetting mechanisms provided “sanctions” for conduct that was not criminal under the GDR’s own laws, but which was nonetheless considered reprehensible by most GDR citizens and outside observers. This was the social understanding of vetting among many East Germans. Legally speaking, however, vetting was not considered a response to past wrongdoing. Rather, dismissals were solely justified if a person was not suitable for holding public office. Past misconduct could, but need not, indicate such a lack of suitability. The gap between these two understandings of vetting policies produced much frustration over the course of the process. Vetting was initially demanded by East Germans on quasi-retributive grounds, but was codified and implemented with a utilitarian and prospective concern about the establishment of a loyal and credible civil service.

Vetting in unified Germany took place in two different arenas. On the one hand, elected representatives on the local, state, and federal level were frequently asked about their “first life”¹ in the GDR. In some states (*Länder*),² persons who had worked for the secret police could not be elected mayors.

But since parliamentarians cannot be recalled or impeached for prior non-criminal misconduct, any screening conducted in parliaments was not likely to have consequences beyond public expressions of indignation by the “clean” political parties. The vetting of the East German public sector, on the other hand, had profound impacts on the lives of many citizens, on the legitimacy of institutions, and on the perceptions of culpability. This chapter will therefore focus on the second arena of vetting: the public service.

Throughout the chapter, I will focus on two questions about the vetting process: first, what are the rationales for vetting? At least two very different rationales competed throughout the process. On the one hand, East German civil rights activists demanded vetting in 1989 and later as a form of civil sanction for past misconduct. This rationale is self-consciously retributive. It focuses on past misconduct, and not on whether the persons changed their ways after 1989. To the contrary, those who had undergone a sudden personal transformation were derisively called *Wendehälse*, in reference to a bird that can turn its neck 180° without turning its body. The prevalent legal conceptualization of vetting, in contrast, emphasized a person’s loyalty to the “liberal-democratic basic order” and discounted past misconduct if there was evidence that the persons had changed their ways. In other words, the laws and jurisprudence on vetting were often seen as favoring *Wendehälse*. The gap between these two understandings was critical, as the local vetting commissions often operated according to the quasi-retributive understanding, while the administrators in the state ministries, and later the courts, operated from the vantage point of the legal conceptualization of the vetting rationales.

The second focus of this chapter regards the conceptualization of misconduct: if thousands of employees are screened, what does the vetting commission look for? Collaboration with the Stasi was elevated to a central position in the matrix of culpability.³ This place of prominence is not entirely deserved, as many readily agree. The reason for the single-minded focus is that the Stasi was perceived as the number one “enemy” during the fall 1989 revolution, and citizens therefore took special measures in securing and managing the Stasi files that later provided the evidentiary basis for the vetting process.

Although the vetting process was widely debated at the time, there are few comprehensive analyses.⁴ The extreme decentralization and fragmentation of the vetting institutions adds to the difficulties of providing an overview. Existing case studies either cover single institutions or focus on the legal framework without incorporating the perspective of the participants in the local commissions. Overall numbers about the vetting process and its effects are

not available because the process was very decentralized and those who have the numbers are often reluctant to share them. In order to link the available numbers with concrete vetting procedures and the experiences of commission members and persons who were heard by the commissions, I will concentrate on a small set of case studies. I examine two very different institutions—public universities and city administrations—in two very different cities—Dresden and Greifswald. These case studies are supplemented with available data for other states and institutions. The form of inquiry is heavily shaped by the availability of information. Given that many institutions, for example the state government of Saxony, do not publish even the most basic data on the vetting process, and that the proceedings of the vetting commissions are still confidential, this study can only be preliminary.

The cases examined here represent institutions that insist on a high degree of public legitimacy and self-scrutiny (universities), and institutions with a lower profile and in less need of legitimizing procedures (city administrations). Universities undertook a comparatively thorough vetting: through a three-step process in which vetting had a prominent role, the universities aimed to perform their own renewal in public. The scope of the inquiry was wider and the standards were stricter than elsewhere. The reason for the universities' extensive commitment to vetting is their self-perception: as centers of intellectual debate with the responsibility for forming future elites, universities needed the appearance of a heightened moral authority that they could only gain through a thorough screening of their staff (similar concerns moved judicial officials when they conducted a thorough screening of judges and prosecutors). Municipal administrations, in contrast, had more streamlined and bureaucratized vetting processes. In the cities, vetting was clearly subordinated to the tasks of reforming the city, whereas universities tended to treat vetting as a precondition for any genuine future reform. The different approaches by these institutions can be taken as models for institutions that need to establish different degrees and forms of legitimacy. The most "severe" vetting process was probably conducted by the judiciary, which needed to gain public trust. The police, in contrast, retained a much higher proportion of their pre-1989 employees, ostensibly for reasons of necessity.⁵ Although universities are not the *prima facie* most important case of vetting, they demonstrate how institutions struggling to regain legitimacy used the vetting process to distance themselves from their former institutional collaboration. In addition, the numbers and records of the vetting process at universities are more readily available than would have been the case for the police or the judiciary.

The two cities differ in size and in the political affiliation of the respective state governments. Dresden, capital of the state of Saxony, is in the southeast. It has about 512,000 inhabitants. Saxony is one of the politically more conservative states. Greifswald, in contrast, is a rather small city with a population of about 58,000 in the northeast. It is situated in the state of Mecklenburg and Western Pomerania, an area with one of the highest unemployment rates (21.6%) and a sparse infrastructure. While Saxony is mainly controlled by the Christian Democratic Party, the state government of Mecklenburg and Western Pomerania shifted from a Christian Democratic and Liberal coalition in 1990 to a Christian Democratic and Social Democratic coalition in 1994, to a Social Democratic and (post)Socialist coalition in 1998 and 2002.

The data are too sketchy to make a strict comparison of these four cases. Yet even incomplete information allows us to draw conclusions regarding the different approaches to vetting, the different procedures chosen, and the underlying rationales for vetting in the given institutional context. I first provide an overview of the vetting process based on the case studies and existing accounts of vetting in other institutions and show how different actors' views of vetting during the 1989–90 transition shaped the legal framework for the vetting process. After examining the vetting process in the municipal administrations and universities in more detail, I will consider the relationships between vetting and other transitional justice policies.

VETTING IN THE PUBLIC SECTOR: AN OVERVIEW

Vetting its employees was part of a larger process of downsizing the public sector. In 1989, there were 2.2 million public sector workers in the GDR. Through privatizations and layoffs, this number decreased to 1.2 million in spring 1991, long before the process of personnel reduction was over.⁶ Vetting was the first step in a large-scale process of restructuring and personnel reduction. Questioning and screening would identify those employees who were not suitable for continued public sector employment in a democratic state. Upon the conclusion of the vetting process, employees would be screened for their professional qualifications for the jobs they held or would hold after restructuring. And, finally, those employees whose personal integrity and professional qualification were beyond legal doubt would be matched with the decreasing number of jobs, resulting in even more layoffs.

In 1990, the city of Dresden employed 18,000 persons. In 2000, only 9,769 employees (54%) were left, of whom 36% had been hired after 1990. Yet only

about 520 employees lost their jobs as a result of the vetting, 2.9% of those employed in 1990.⁷ In 1990, the University of Greifswald had 5,650 employees. In 1998, 3,600 (64%) remained, including many new hires. Yet only about 90 employees, 1.6% of the 1990 personnel, had to leave as a direct consequence of the vetting process.⁸ But many institutions “lost” up to half of their employees before the vetting even started; presumably a number of them left in anticipation of the widely announced process. The police in Thuringia, for example, had 12,000 officers in November 1989,⁹ but only 6,700 were still employed when the vetting process started in mid-1991. Many higher-level officers resigned because they either knew or feared that their careers were over; others had been confronted with (nonbinding) votes by their subordinates suggesting their resignation for specific reasons.¹⁰ Still, vetting was not the quantitatively most important part of the public sector downsizing and renewal.

The relationship between vetting and public sector downsizing is complicated. On the one hand, vetting contributed to the downsizing, though not in overwhelming numbers. Yet in some cases, for example in the public school systems in Brandenburg and Saxony, administrators hoped that vetting alone would accomplish the needed downsizing. In these cases, opponents charged that accusations of past misconduct were simply masking an attempt to dismiss as many teachers as possible.¹¹ Even if vetting was not a major source of dismissals, it introduced some notion of equity: in a situation in which many people would lose their jobs through no fault of their own, vetting would at least ensure that those culpable of past misconduct would not keep their jobs either.¹²

The most contentious aspect of the vetting process was the search for appropriate vetting norms. Since vetting was only formalized with the unification treaty in 1990, opponents of the process characterized it as an imposition of West German norms on conditions under which these norms were inapplicable. Yet by the fall of 1989, the opposition movement was demanding vetting in order to establish trust in the public sector, identify secret police informers, and openly reckon with the past. The early impulses for vetting came from the East Germans, and many West Germans who later joined the state ministries and universities kept their distance from the vetting because they felt the matter “did not concern them personally at all.”¹³ But the problem of the norms’ pedigree is not solved by examining the beginning of the vetting process. First, the judicial interventions in the vetting process followed West German precedents almost exclusively while paying scant attention to the specifics of the context.¹⁴ And second, the charge that East Germans were

judged according to West German standards was an argument frequently used for forging political alliances and affirming identities as “East Germans.”

QUESTIONNAIRES, HEARINGS, RECOMMENDATIONS, DECISIONS, CHALLENGES

Although the vetting process was decentralized, it followed a similar pattern in all jurisdictions. The public sector employer, for example a state government, court, or city administration, decided on the procedure within the constraints of the law. Employers usually required employees to complete questionnaires about their political functions in the GDR and any MfS contacts they might have had. A commission set up to examine all employees within the institution then compared the questionnaires with the personnel files and other sources, aiming at making recommendations about retaining or dismissing employees. In cases where there was no evidence of relevant misconduct, the commission immediately recommended continued employment with the reservation that their nonparticipation in MfS' activities needed to be corroborated by a central office in charge of the MfS files. Employees for whom the commission had potentially damaging evidence or allegations had an individual hearing, to give the employees an opportunity to comment on and respond to the evidence.

Two basic models of vetting commissions emerged in response to different institutional demands and structures. In the *administrative* model, the commission was composed of members from within the institution by virtue of their function, and not as the result of an election. This model fitted vetting into the everyday administrative work but could not generate high levels of legitimacy because there was neither the democratic legitimacy of an election nor an independent check by members from outside the institution. In contrast, commissions operating according to the *pluralistic* model had a diverse membership drawn from representatives of the institution that was to be vetted and various outsiders deemed to have professional expertise (e.g., lawyers), or high moral standing (e.g., representatives of civil society or the church). Many members of these commissions were elected by their peers or appointed by state parliaments. This model demanded more resources and attention, but the resulting commissions were seen as more independent from the governments and institutions they screened and thus commanded greater legitimacy. The commissions would usually only issue recommendations that would be reviewed by the head of the administration or a task force commissioned by her. The scope and depth of this review varied. In many cases, the administra-

tion only tried to ensure consistency across the vetting commissions in their jurisdiction. They also regularly discussed the applicable criteria with representatives of the commissions.¹⁵ Sometimes, employees for whom dismissal was recommended had a second hearing before a different committee.¹⁶

When the authorities decided in favor of dismissal, they usually offered the employees a consensual termination of their contracts. This had the advantage for the employees that they were not fired, which would carry a stigma, but the disadvantage that consensually terminated contracts could not be challenged in court. During the first years after unification, many employees were not fully aware of their rights, and were afraid to take their employers to court. A large number of those who were dismissed under the early, more stringent standards accepted the employer's offer to terminate employment by mutual agreement. They could consequently not challenge their dismissal in court.¹⁷ Although the labor and administrative courts were very involved in reviewing challenges to the vetting process, many people were reluctant to follow the legal route.

All vetting commissions faced significant evidentiary problems. In accordance with a February 1990 directive by the pre-democratic transitional government, the employees' personnel files were often "weeded out" by employees and well-meaning superiors.¹⁸ Many potentially compromising records were removed. Thus, the commissions would need independent information about the employees' political careers in order to check the questionnaires against sources that did not rely on self-reporting. The commissions varied greatly in their ability and willingness to conduct thorough searches of the archives of the SED, trade unions, and other relevant institutions. The files were often under the jurisdiction of the successor organizations, which had no interest in allowing access to files that could compromise the professional careers of their members. As a result, vetting for misconduct of SED and other officials relied on self-reporting, institutional knowledge about the person's conduct, or (unlikely) access to well-ordered files. Even commissions that insisted on high functions in the SED or one of its satellite organizations as a vetting criterion found it hard to apply it consistently. At best, they only found "the honest ones" and those whose functions and actions were widely known. Thus, the evidentiary problems compromised the vetting for categories of persons who were often no less culpable than those on whom the process came to concentrate.

The only category of files that was accessible in a managed way was the records of the MfS. In fact, commissions and employees had to put very little work into gathering this information as the Office of the Federal

Commissioner for the Records of the National Security Service of the Former German Democratic Republic (the Stasi records) provided them with summaries and excerpts from the files. Without the work and assistance of this office, the vetting process would have had to rely almost exclusively on self-reporting. The excerpts from the Stasi files were the single most used and reliable source for the vetting process. As a consequence, in addition to a few higher-level SED functionaries, most of the persons who were dismissed had worked for the MfS. Prompted by this practice, public discussions about culpability, collaboration, and suitability for public office narrowed down to the question of whether someone had been an “IM” [*Informelle Mitarbeiter*] (informal employee or collaborator) or not. This was an unintended consequence of the Stasi Records Act, which put vetting on a sound evidentiary basis at the expense of narrowing it down to just one category of misconduct. As it happened, this narrowing of the focus coincided with attempts of various political groups to exculpate themselves at the expense of the Stasi.

LIES AND PROGRESSIVE LENIENCY

How many people lied on the questionnaires, no one knows. Answers to the question about contacts with the Stasi, which is the only question on which independent verification could be sought, does not leave much room for optimism about the employees' truthfulness. In cases where the reconstruction of the percentage of misrepresentations—meaning persons who falsely claimed not to have worked with the MfS—can be deduced from statistics, it is around 90%.¹⁹ This is confirmed by the experience of commission members.²⁰ The rate of misrepresentations might be lower on other sections of the questionnaire because political functions, for example, are a matter of public record, while clandestine MfS work is not.

There are several possible motivations for the untruthfulness. Some were sure that their files had been destroyed by the MfS in November 1989. According to an MfS report, on November 23, 1989, one woman whose case was decided by the Federal Labor Court “was told that all records on her... were destroyed and that it is impossible to construe a connection between her and the MfS in the case of anti-socialist developments.”²¹ Others feared they would be ostracized if they admitted to MfS contacts, and some might have thought that the attitude towards MfS informers would get more positive over time:

I have one or two friends who talked to me. They had signed such a thing some time ago. And they asked me, should I list it in the questionnaire

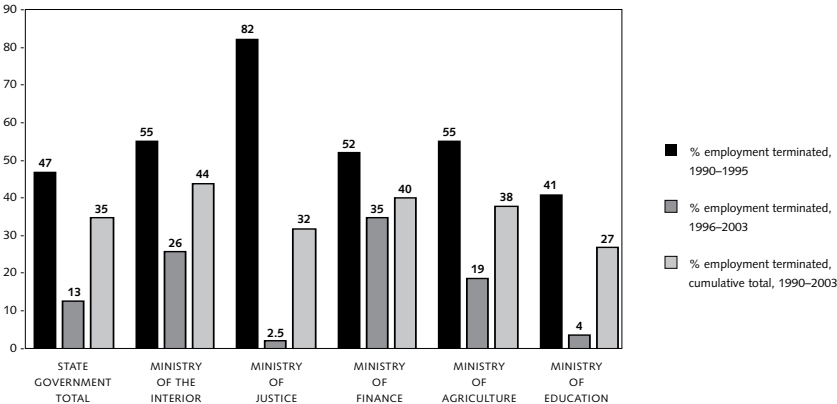
or not? And I said, if you write it in there, you're out. And if you don't write it in, and they find it out, you're out. So don't write it in. First of all because of the job, but also because of the social consequences that came with this. In each case of an unofficial informer that came to light, there was always talk and slander. They were dead, socially speaking. This is why I advised them to do it this way. Whether they followed my advice or not, I cannot say.²²

It is unclear how many "got away" because their files were either destroyed or were not yet reconstructed by the time their employers wanted information on them, but the bet on the progressive leniency of the vetting commissions turned out to have been wise. Those who admitted to MfS work or were found out to have been informers early on had a significantly higher risk of being dismissed (see Graphs 1 and 2). In the state government of Mecklenburg and Western Pomerania, the rate of MfS collaborators who were dismissed decreased from 47% for the cases dealt with before 1995 to 13% for the cases dealt with from 1996 to 2003. The cumulative average of 35% hides the steep decline in the rate of dismissals.²³ For the University of Greifswald alone, the rate of dismissals decreased from 74% for cases decided before 1996 to 29% for cases decided between 1996 and 2003.²⁴

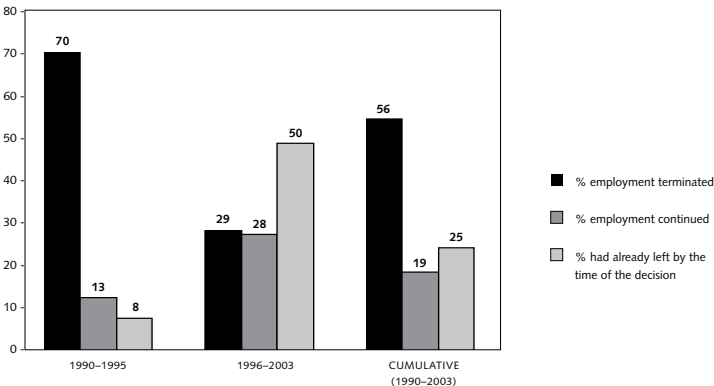
What accounts for this progressively increasing leniency in the vetting? Were the commissions just letting off steam at the beginning of the process? While commission members acknowledge that they learned to evaluate the cases of MfS informers "in a more nuanced manner,"²⁵ other factors played into this steep decline and will be explored in detail later. In the case of Mecklenburg and Western Pomerania, the parties forming the state government had shifted: from 1990 to 1994, a coalition of the Christian Democrats and the Liberal Party governed, succeeded by a coalition of the Christian Democrats and the Social Democrats in 1994, and then a coalition between the Social Democrats and the SED's successor party, the Party of Democratic Socialism [*Partei des Demokratischen Sozialismus*] (PDS), in 1998. The latter change of government produced a massive change in attitudes towards vetting, as participants attest.²⁶ It also made optional the hitherto mandatory vetting of new hires.

However, there is a deeper reason for the progressive leniency, and it is connected with the rationales for vetting. If vetting were a quasi-retributive strategy concerned with past misconduct alone, the progressive leniency demonstrated by the government would point to serious flaws in the implementation of the process. Yet the legal rationale for vetting was that past misconduct was an indicator, but not a determinant, of a person's suitability for

GRAPH 1
Vetting over time in the state government
of Mecklenburg and Western Pomerania



GRAPH 2
Vetting over time at the University of Greifswald



public office. In this conception, the employees' post-1990 conduct would count for the purpose of establishing whether they were indeed loyal to democratic and liberal principles. A good post-1990 record could outweigh past misconduct. Obviously, employees whose Stasi ties were detected in 1992 had little good post-1990 conduct to show to the committee. In contrast, someone who had lied about having worked for the Stasi, and who was only found out in 1997, could point to eight years of devoted service in a democratic administration, and would be far less likely to be dismissed. Thus, a vetting rationale that emphasizes concerns about employees' current and future suitability in a democratic civil service is likely to result in a progressive decline of dismissals over time.

Progressive leniency seems to be supported by the idea that people should be given a second chance. However, the reasons why some employees were evaluated in 1992 and others in 1997 are at best morally arbitrary. It might be that the files of the latter persons were only found later. Or the employees who were already evaluated in 1992 had admitted in the questionnaire that they had worked with the Stasi, and the search for their files was accordingly expedited.²⁷ In contrast, the requests for the files of those who had falsely indicated that they had not worked with the Stasi would be part of a massive pile of requests to be worked through much later. Since the vetting process stretched over a long period of time, the standards oriented to present rather than past conduct caused differential treatment of similar cases based on arbitrary factors.

From 1990 to 1992, before the federal commissioner's office started working, the vetting processes were either solely based on self-reporting or emphasized abuses of power committed in SED functions. The screening for MfS informers only started in earnest in 1992, when the downsizing of the state governments was nearly completed. Accordingly, many who were later vetted for MfS work had already been integrated into the restructured institutions.

How many people were dismissed as a result of the vetting process? The absolute number seems impossible to establish because of the fragmented nature of the process. However, the available numbers for some jurisdictions show general patterns and can lead to conclusions about the relative numbers of people vetted in institutions. The data show, first, that the search for MfS informers was the dominant theme in the vetting process. Only institutions that paid special attention to other forms of misconduct, as did the Dresden city administration, dismissed roughly equal numbers of employees for MfS work (271) as they did for other forms of misconduct, most notably abuse of power in SED functions (247). Until September 1992, the vetting commission

of the University of Greifswald had recommended 63 dismissals, 43 (68%) of them for MfS work and only 20 (32%) for other reasons. Other institutions either considered non-MfS misconduct only when it was brought to their attention, or in cases of high-level personnel.²⁸ Since the overall numbers of non-MfS-related misconduct are impossible to establish, we do not know how strictly or consistently these criteria were applied.

The only area for which it is possible to gauge the consistency of the commissions' work is the field of Stasi informers. For each institution, the number of queries to the federal commissioner's office is known, as is the number of notices issued from that office in response. Notices say either that, according to the available files, there is no evidence the person worked with the MfS or there is evidence, and then give summaries and excerpts from the files. The rate of "positive" responses, stating that an employee had worked with the MfS, indicates how serious the MfS infiltration of an institution had been. The rates of informers typically ranged from about 3%, in universities, municipal administrations, and ministries of finance, up to 14% of the civilian employees of the Ministry of Defense,²⁹ 20% of the GDR soldiers, 16% to 18% in the state ministries of the interior, and 13% to 18% percent in the police forces, which make up large parts of the employees of the state ministries of the interior.³⁰ The large number of persons listed as MfS informers among the military and the police is partially due to the interpenetration of the MfS, police, and the army. Many who later became police officers did their military service in the MfS elite unit "Felix Dshershinky" and were listed as MfS employees for the duration of their service. In the Thuringia police, 458 of 1,611 informers (28%) were in this category.

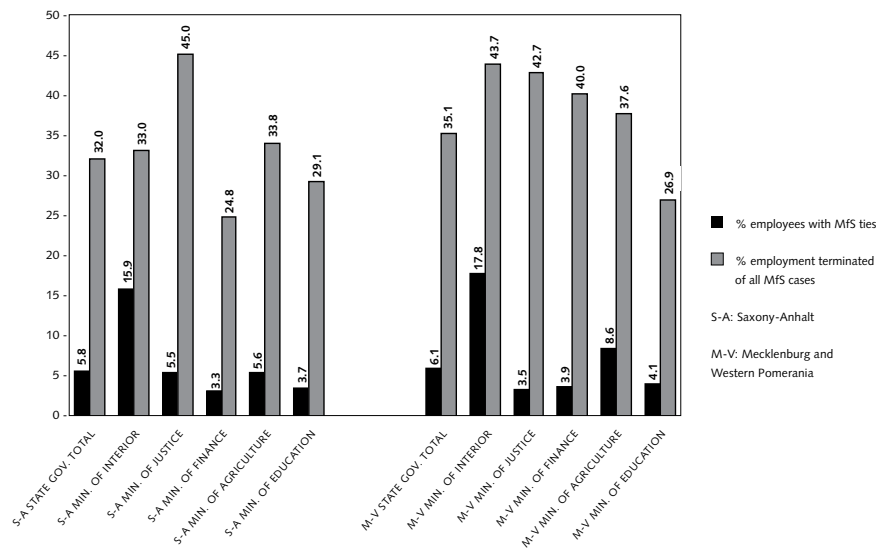
People who worked for the MfS did so for different reasons, in different circumstances, with different intentions, and with varying intensity. Although the relative numbers of informers in the various institutions allow some conclusions about the Stasi's penetration of the institution, they do not tell exactly how many people were informing on colleagues, friends, or family. A sizeable number of persons on whom the federal commissioner's office returned evidence of collaboration had neither intended to damage anyone nor indeed caused any harm, and others had been pressured into signing a declaration. The commissions were therefore determined to conduct an individualized review of the cases, to invite the employees for hearings, and, if they were still undecided, to study the complete files. An additional moral problem was that not all acts of informing for the Stasi or taking instructions from them were recorded in the files: MfS collaboration that was part of someone's duties on

the job did not lead to the opening of a file at the MfS, and therefore did not produce a “positive” response from the federal commissioner’s office. Stasi officers testified that collaboration “on the job” was often more effective for gathering information and for relaying instructions for the workplace harassment of dissidents.³¹ Since these activities were not systematically recorded in the files, the commissions could not systematically establish the extent of the collaboration of higher-level administrators and managers with the MfS. This meant in some cases that the “small fry” who spied as informal collaborators were dismissed while the “big fish” for whom spying was part of the job description could stay.

The rates of dismissals of MfS informers might suggest some conclusions. First, the overall dismissal rates are between 25% and 45% in most institutions. This can hardly be described as the indiscriminate witch hunt that some feared it would become. However, the rates of dismissals were higher in the first years and then dropped. The cumulative dismissal rates in most institutions indicate that the commissions and administrators indeed tried to judge each case individually and did not automatically retain or dismiss employees who were listed as MfS informers. Yet the moderate cumulative averages in some cases hide steep changes over time. What are the reasons for the existing discrepancies among the rates of dismissal in different parts of the same government, and among different states? According to the legal framework for the vetting process, employers had to weigh the evidence of misconduct against conduct after 1990 and the requirements of the position that the employee wanted to hold. Obviously, some forms of misconduct can be acceptable for accountants but not for police officers or teachers. Thus, the differences might be due to the different ethical requirements for jobs in the respective government departments. The individualized criteria theoretically allow for large discrepancies in the percentages of “MfS-positives” who were dismissed, but the application of a large number of criteria makes the evaluation of the application of these criteria harder and potentially allows for arbitrariness.³²

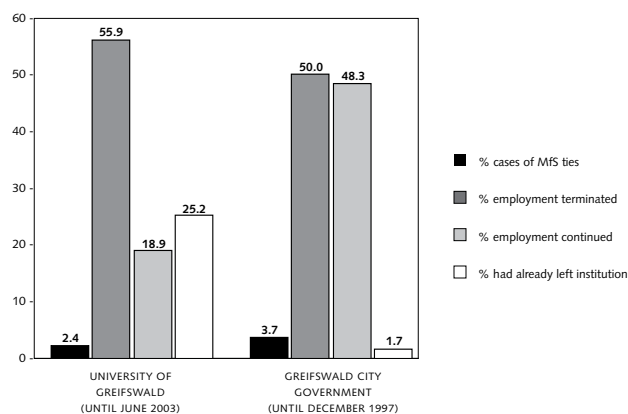
Dismissing persons who were politically well connected for abuse of power surely sends political signals. But vetting was limited to the public sector, and was applied unevenly throughout the sector on the different levels of the federal system. The unemployment offices, for example, which are under federal jurisdiction, did not conduct any vetting before the mid-1990s, and effectively provided a safe haven for many who had lost their jobs in other parts of the public sector.³³ There are also reports that teachers and police officers who were exposed as MfS informers accepted the offer to terminate

GRAPH 3
Rates of MfS Informers and Dismissals in State Governments



The first column for each institution shows the percentage of cases in which the federal commissioner for Stasi records had determined that the employee had worked for the MfS. The second column shows what percentage of these employees were eventually dismissed or agreed to dissolve their employment contracts. Calculations based on statistics provided by the respective state governments.

GRAPH 4
Vetting in the University and the City Government of Greifswald



their contracts by mutual agreement and subsequently found employment in the western parts of Germany, where vetting did not take place.³⁴

Aside from exploiting gaps and loopholes in the vetting process, those who were dismissed could also turn to the private sector. "They are not prohibited from making money. They can earn money in the industrial sector, they just cannot represent the state vis-à-vis the citizens in the public sector,"³⁵ said one former city official in Greifswald. The transition into the private sector was more viable in the earlier years, and for persons who already had "connections." This means that those who were part of the SED network and were dismissed early on probably had better chances of finding new employment than unofficial informers who were only found out later. The purpose of vetting was not to subject them to the social stigma of indefinite unemployment, but this was the unintended consequence in many cases.

THE PREHISTORY OF VETTING

The rapid dissolution of the SED and then the GDR in 1989 and 1990 was largely unforeseen. A host of factors converged to create a situation that the regime was both unable and unwilling to control. By the late 1980s, both emigration and dissent had increased and seem to have reinforced one another. In the first months of 1989, 36,484 citizens left the GDR legally, at least another 4,849 illegally, and 2,070 were caught trying to flee illegally.³⁶ Meanwhile, a wave of demonstrations that had begun in protest against the rigging of the May 1989 local elections mobilized increasing numbers of people. Protest and exit increased, and in mid-October the MfS and the police had given up on repressing demonstrations. Erich Honecker, head of state since 1971, was replaced by a very moderate reformer. Further government changes followed, and the borders were opened on November 9. Opposition groups and the SED started a dialogue to facilitate the change. The legitimacy of political arrangements increasingly depended on the assent of the citizens' movement.

In mid-November, citizens felt strong enough to challenge the Stasi directly although the "shield and sword" of the weakened party was still alive and well. There were rumors about a possible coup by the Stasi and/or the army. On November 22, a public forum in Greifswald addressed the issue of the Stasi. The discussion was tense, a former city administrator recounted:

It did not take long until one of the speakers from the audience demanded that the Stasi should no longer exercise any police functions. I suggested a quick poll on this issue, and many agreed audibly. But in order to show the ratios, I asked for a show of hands. Almost all arms

were raised. Six were against it, 14 abstained. This was the turning point [Wende] for the comrades of the Stasi. They grew pale and very insecure. Suddenly the climate had changed.”³⁷

That night, for the first time, citizens “inspected” the local Stasi headquarters. Since November 7, the Stasi had been shredding and burning files in response to the demonstrations that often passed by their buildings.³⁸ Beginning on December 4, 1989, local citizens’ committees occupied Stasi headquarters in Greifswald and most provincial capitals in order to prevent the further destruction of records.

The citizens’ occupation of the Stasi headquarters throughout the country was crucial for further policies regarding the Stasi for three reasons: First, had the destruction of the files continued at the projected pace, vetting would have become much more difficult. The more files that are available, the less informers can mistakenly pass scrutiny. Second, many of those who later shaped vetting policies on the local or central level, participated in vetting commissions, or worked in the office of the federal commissioner for the Stasi records had taken part in the occupations of Stasi buildings in 1989. And, finally, the occupation of the Stasi headquarters was perceived as an act of citizens taking moral possession of “their” files. “I want my file” was a common slogan. And during the months that followed, they did not let up. The office of the federal commissioner was a creation of this movement. For those who had been spied upon by the Stasi, the desire to control the files expressed the wish to recover mastery over their lives by reading what the Stasi had gathered, planned, and done. Just as individuals thought about “their” files as their moral property—after all, it was their lives that were documented in them—the citizens’ movement saw the great mass of Stasi files as the collective property of East Germans. The citizens’ movement demanded that the files be preserved, protected, and made accessible for victims and for vetting purposes. Later, when the West German negotiators to the unification treaty wanted to put the Stasi files into the federal archive—with the usual archival restrictions—many who had occupied the Stasi headquarters feared they would be dispossessed of their only recently recovered history.

Thoughts about vetting had surfaced frequently during the early phases of the dissolution of the Stasi. At that point, the Stasi was still active and citizens still feared that there would be Stasi-directed agents provocateurs among them.³⁹ The newly emerging democratic movements usually expelled unofficial informers, if simply because no one was sure whether these persons

were acting on their own behalf or at the request of the Stasi. Were they independent or following orders? Were they citizens or agents? "The people are finally beginning to determine what is going on in this state. But there is still machinery of the old powers that remains invisible to us and is frightening us,"⁴⁰ said one person to the Greifswald Commission of Inquiry. The demands for exposing the structures of the Stasi, for democratic openness, and for vetting often went hand in hand. He continued:

Citizens, help these informers to escape the spider web of the Stasi. We need to learn to look each other in the eye. Give them the chance to become upright citizens. Do not call for vengeance, but for uncovering, punishing those who are guilty, and rehabilitating the victims. Distinguish between the seducers and the seduced, between the blackmailers and the blackmailed.... A change in the structure and method of the apparatus needs to come with a change in personnel. Whoever was trained [*gedrillt*] in the repression of the people is not suitable for preserving our national security. For this important office, we need citizens who did not just watch the change [*Wende*] from behind their desks. Here, too, we need democrats. Trust can only grow where the past has been scrutinized by an independent investigatory committee. Then we will find out whom the people trust to take care of their national security.⁴¹

In this speech, the two main rationales for vetting appear side by side, not yet contradicting one another as in later cases: vetting as the prerequisite of trust in public officials, and vetting as a milder form of punishment for past misconduct. Yet the warning that the country needs "democrats" and not people who watched the revolution from behind their desks suggests that the citizens' movement would not be enthusiastic about welcoming persons with very recent and sudden changes of heart to key positions.

The Stasi extensively relied on ordinary unofficial informers (IMs) in all areas of society. The informers usually had to sign a declaration formalizing their status in the Stasi's system. The recruitment of these informers was based, as the Stasi stated, on the "positive social convictions of the candidate, personal needs and interests of the candidate, the creation of desires to get backing or to make amends for his actions, on the basis of compromising material, or on a mix of those."⁴² In short, people became IMs because they were convinced they were helping socialism, because they hoped for an advantage (like travel abroad), because they hoped to avoid a disadvantage,

or because they were blackmailed. Reasons and motives were mixed, so that each case needed to be evaluated individually.

The MfS had been a key player in monitoring and suppressing dissent since the 1960s. The MfS was founded in 1950 as the “shield and sword” of the party, grew in importance in response to the 1953 uprising, and steadily expanded until its dissolution in winter 1989–90. By that time it had 85,000 full-time employees and about 180,000 “unofficial informers,” dubbed IMs.⁴³ The MfS aspired to know the opinions and attitudes of all the GDR’s citizens insofar as it was necessary for sensing dissatisfaction and opposition. It was both the secret service and the secret police. The Stasi combined the gathering of information with acting upon the collected material. Among the Stasi’s most infamous practices was *Zersetzung*, the “disintegration” or “subversion” of individuals who had raised alarm in the Stasi. This insidious practice was designed to refrain from outright physical repression. Instead, the Stasi’s hidden network of informers and collaborators reshaped someone’s life and “organized” his or her personal and professional failure. A 1976 guideline asks Stasi employees to work on the basis of “exact evaluations of the work on the respective operative item [meaning the observed person], especially the developed indicators as well as the individuality of the person to be worked on.” Among the “time-tested forms of disintegration” are “systematically discrediting the person’s public reputation and prestige on the basis of connected, true, and verifiable facts as well as false, credible, and nonfalsifiable and thus equally discrediting facts”; “the systematic organization of professional and social failure in order to undermine the respective persons’ self-confidence”; “purposefully undermining convictions in connection with certain ideals, role models, etc. and the production of doubts about one’s personal perspective”; and “the creation of mistrust and mutual suspicions.”⁴⁴ Practices like *Zersetzung* required the seamless cooperation of MfS and employers, often co-workers, and sometimes very close friends. Directors, high party functionaries, and personnel managers often kept “job-related” contacts with the Stasi. Often they were asked about employees or students, and sometimes they took orders from the Stasi regarding the “treatment” of specific persons.⁴⁵ These contacts were a regular part of some jobs, and this fact was widely known. People who held such jobs often claim in retrospect that these contacts were trivial. Indeed, although the devastating effects of such “disintegration” on its victims are beyond dispute, it is hard to pinpoint responsibility. Not all participants in this “measure” would have been aware of the full scope of the action. While many persons were required to achieve the insidious goal, how much responsibility did each of them have? Most of all, did they do anything illegal? One of

the often-stated goals of vetting is to censure noncriminal but unacceptable behavior, like participation in *Zersetzung*.

In spite of the moral complexities and the involvement of various institutions in the state repression, popular ire concentrated on the Stasi. The Stasi was secretive and was still subverting opposition groups while the SED functionaries practiced the talk of reform. Moreover, the Stasi, which was visibly burning the files with all their secret knowledge, was an easier and more obvious “enemy” than the SED.⁴⁶ While citizens started digging through the Stasi files, the SED sat at the round table talks with a partially genuine desire to reform the country. An SED party convention in December 1989 gave it a new name, SED–PDS (Unified Socialist Party–Party of Democratic Socialism) and a new chair, the lawyer Gregor Gysi. His strategy was to insist that SED members were normal citizens who had just been doing their jobs. Privileges and corruption were the lamentable exception.⁴⁷ Indeed, people had very different motives for joining the SED, career advancement being one of them. It seemed implausible to penalize someone for mere SED membership because it was so widespread and the SED was a potent political force in 1989 and 1990. Yet there were attempts to disqualify those who had used the power granted to them by the SED to the detriment of individuals, or against the interests of the institutions in which they had worked. But the initial focus on the Stasi remained. In Parliament, too, it was comparatively easy to focus on the Stasi and “to bring up . . . the goal to have a clean, ethically qualified, administration that had not been involved in breaches of trust.”⁴⁸ Moreover, SED functionaries seemed to be “people like you and me,” while MfS informers were still hidden and shrouded by an aura of secrecy and betrayal.

At the beginning people were screening for Stasi because, they said, these are the invisible pillars of the system, we cannot let them get away with that. We know who were the open supporters of the system. But this knowledge soon faded, and the SED functionaries especially have been hiding splendidly behind the entire discussion about the unofficial Stasi informers.⁴⁹

The initial focus on the Stasi was soon incorporated into laws that would preserve and secure the Stasi files and regulate their use for information and vetting purposes. Similar provisions do not exist for SED files, or any other files. What started as an early focus on the breaches of trust committed by the Stasi was soon cemented into a vetting priority through the differential treatment of the files in federal law.

THE LEGAL FRAMEWORK

The vetting process relied on two basic tenets: the laws governing the dismissal of public sector employees, and the law on the use of the Stasi's files. The former supplied a rough framework of vetting criteria, and the latter provided the means of obtaining evidence for a carefully circumscribed area of misconduct. In this section I will outline the legal framework of the vetting process, focusing on how the laws conceptualize the purpose of vetting, and which criteria they propose.

THE UNIFICATION TREATY

With unification in 1990, employees in the East German public sector nominally kept their jobs. Yet because the public sector was disproportionately large, staffed with party loyalists and persons who had abused the power of their positions, and not qualified under the terms of the West German administrative law, the unification treaty provided for easier dismissals under specific conditions in its appendix I, chapter XIX, section III, paragraphs 4 and 5. First, *extraordinary* dismissals (with no advance notice) were possible if the employee “was active for the former Ministry for State Security” and it therefore seemed unreasonable to expect the employer to continue the labor contract; or because the employee had “violated basic principles of humanity and the rule of law, especially human rights as guaranteed in the 1966 Convention on Civil and Political Rights and the principles contained in the 1948 Universal Declaration of Human Rights” (para. 5). The latter clause represented an attempt to introduce the bold language of moral indignation into the law without considering how to operationalize the criteria. The clause was usually not applied because of its vagueness and impracticability. Extraordinary dismissals were only contemplated for those who had worked with the MfS.

The most common reasons for *ordinary* dismissals according to paragraph 4 were the “lack of demand” (that is, for the employee), and the employee’s “lack of professional qualification” or “lack of personal suitability.” These clauses expired in 1993, unlike the clauses providing for dismissals because of MfS work. The clause on “personal suitability” imported a contested branch of West German labor law into the vetting process. Since denazification, but especially since the disputes about the radical Left’s “extraparlimentary opposition” in the 1970s, the jurisprudence on public sector employment hedged on the definition of what conduct, political or otherwise, should disqualify a person from public sector employment. The rationale for this ambivalence is that the state wanted to prevent its civil service from undermining the state

from within, as had ostensibly happened in the Weimar Republic (1918–33). But the far older conception of a German *Beamter* (civil servant) implies a high social status for civil servants in return for an elevated level of loyalty to the state.⁵⁰ Thus, according to high court jurisprudence, a public sector employee has to make a plausible case that “in his entire conduct he stands by the liberal and democratic order of the Constitution.”⁵¹

The “personal suitability” clause in the unification treaty did not provide factual criteria based on the East German situation, but tacitly imported legal criteria from past disputes about public sector employment. During the early years, the task of establishing and applying the criteria was largely left to the vetting commissions. They established criteria based on their appreciation of facts and the institutional context, but these criteria were not used by the labor courts. The labor courts, newly created in 1992 and initially staffed with judges from the western states, were more competent in legal precedents than in distinguishing among various functions in the SED and different types of Stasi informers. The state commissioners for the Stasi records, whose task was to advise participants in the vetting process on these matters, were rarely consulted by the courts. When the commissioners issued guidelines for vetting to their respective state governments, these guidelines explained the different categories of Stasi work and quoted court decisions at length.⁵² But the labor courts did not refer to these guidelines. On the contrary, the guidelines had to be periodically updated to reflect the changes in jurisprudence.⁵³ The establishment of vetting criteria was later driven by the labor courts rather than by the state governments or the vetting commissions.

When can employees be dismissed? If they lack the “personal suitability” for continued employment. Their conduct in the GDR, therefore, is thus only relevant insofar as it impinges upon their current and future suitability for employment. Thus, the criterion is not guilt, or “entanglement in the system,” as German courts politely call it, but the suitability for a specific position. The link between past misconduct and present suitability depends on an underlying conception of the possibilities and limits of personal transformation in times of political change. What does an individual’s Stasi file tell about one’s current readiness to stand up for liberal and democratic principles, if need be? If a teacher staunchly believed in real existing socialism in 1988, why should we not trust him or her to believe just as staunchly in democratic principles today? At least in principle, people can change, they can learn, and they are capable of reinventing themselves as reliable democrats. But how deep or shallow is such a personal transformation? And can it ever be credible to onlookers who have experienced a person in both his or her “GDR-self” and

his or her “democratic self”? Looking at current attitudes only risks mistaking adaptation for conviction, but do civil servants who obey law and order really need an unshakable democratic record, or is behavioral adaptation sufficient?

The labor courts agreed that “whoever had to fight our constitutional order because it was ‘reactionary’ and ‘imperialistic’ over a longer period of time as part of the mission in the functions that they held can not credibly subscribe to the contrary position, unless they had already distanced themselves from the ideology through concrete acts.”⁵⁴ On the other hand, the employees can “show concrete circumstances that lead to the conclusion that they are now subscribing to the principles of the Constitution.”⁵⁵ In each case, the lack of personal suitability can disappear over time as the employees adapt to the new normative system.⁵⁶ This jurisprudence allows for personal change, but in making attitudes and the proof of attitudinal change the standard for suitability, the courts run the risk of policing views rather than paying attention to past deeds.

The question of weighing past misconduct against current adaptation triggered different reactions from West Germans and East Germans. West Germans (and many PDS sympathizers who were busy reinventing themselves as democrats) tended to follow the labor courts’ line of argument that an employee’s overall personality should be evaluated, and that the more time had passed since 1989, the more the democratic credentials in the new system should count. A West German law professor summarizes this position:

In principle I agree that one should not reduce people to acts from a long time ago that they are guilty of, if you can even describe it as guilt. Instead, you have to appreciate that people can develop, that they can acquire a better understanding, that humans beings can become guilty, that there is something like probation.... And it is really not about punishment. We are not dealing with criminal law here but with the law of public sector employment. And thus the question is whether an employee is trustworthy, which is a matter of current conduct and expectations for the future. This is of course a prognosis, and... one can say that in order to answer the question about the present, you [have to] look back into the past. But if the last four, five, six, seven years in which somebody has proven to be a capable colleague are part of the past, then it is harder to go back to old so-called mistakes.⁵⁷

Former members of the New Forum,⁵⁸ in contrast, were ambivalent about these claims. They felt that a too rapid and successful adaptation to the new

democratic norms should be viewed with skepticism: “We were startled to find out that some people function perfectly in any system.”⁵⁹ The contradictions between the two competing vetting approaches are sometimes bridged by a stance that sees past misconduct irredeemable in cases where it caused specific harm to individual persons:

The standard has to be whether there are persons who could find out by reading their file that this person was directly involved in the repression and had harmed them.... Then it does not matter much how this person has developed in the last years, because you had set the criterion that a job in a state governed by the rule of law [*Rechtsstaat*] cannot be represented by someone who has visibly supported the unjust regime [*Unrechtsstaat*] and has harmed persons.⁶⁰

Disagreements about the vetting process were partially rooted in deeper disagreements about human capabilities for change, and about continuity in personal identities. Those who wanted to separate their “first life” from their “second life” and those who had come from West Germany and were newcomers in the eastern parts of the country understandably insisted on a greater human capacity for reinvention, and advocated a focus on the present. Others who had experienced their neighbors and colleagues in different “incarnations” insisted on looking at their “entire life story.”

But even if it is agreed as to how much past misconduct matters, what exactly constitutes misconduct? The unification treaty mentions work for the Stasi as a form of grave misconduct but does not specify other misconduct that could indicate a lack of “personal suitability.” The major disagreement about the conceptualization of misconduct was whether occupying a certain function or position is sufficient, or whether there needs to be evidence of concrete misconduct beyond the normal duties attached to the function. On the one hand, persons held higher party offices voluntarily. Once they had these positions, they were expected, for example, to reprimand students for “political-ideological diversion” or ensure that SED members would have an advantage over others when it came to promotions. From this perspective, the chairs of the university vetting commissions in Mecklenburg and Western Pomerania agreed that “misconduct is already established if the employee held certain functions and positions. It does not need to be shown that he used his position to the detriment of others,” because “holding these positions is an objective entanglement in the unjust regime and thus constitutes an objective unsuitability” for public employment.⁶¹ As time passed, courts disagreed with

this rationale. A sanction demands the proof of concrete misconduct beyond the then “usual loyalty,” and holding a function in the party apparatus cannot constitute a presumption of unsuitability.⁶²

The courts wanted to back their standard with the argument that “normal” conduct would not later be made blameworthy. Only conduct that went beyond the “loyalty that was necessary and usual for a career in the [GDR] public sector”⁶³ could lead to questions about the employees’ suitability. Only those who went beyond the call of duty in committing “gravely repressive or harmful” acts would be held accountable.⁶⁴ By drawing on a distinction between “usual” and “excessive” conduct, the courts unwittingly helped to establish a narrative of moral normality in East Germany. This normality includes the “loyalty that was necessary and usual for a career in the public sector,” for example. This assertion of “normality” is disputed by others who emphasize, for instance, that most GDR citizens who were asked to become MfS informers refused to do so.⁶⁵ Are careerists and informers the norm, or are they an exception? Should the decision to forsake advantages that would have come with an SED membership, or even with signing up as an MfS informer, be considered heroic or normal? These are key issues in the reevaluation of the GDR moral landscape.

From 1992 to 1996, the jurisprudence slowly shifted towards principles that were careful to limit dismissals to persons who had committed exceptional and harmful misconduct, and that would factor in how well an employee had adapted to the new democratic conditions. Thus the courts shifted increasingly away from the understanding of vetting that was predominantly shared by members of the vetting commissions.

THE LAW OF THE FILES

The unification treaty provided the framework for the development of the vetting criteria, but did not equip the commissions with means for securing the necessary evidence to prove misconduct. The commissions profited from a law that aimed to make the MfS files accessible to different audiences: the Law on the Records of the State Security Service of the former German Democratic Republic (Stasi Records Law, *Stasiunterlagengesetz*).⁶⁶ This law had a predecessor in one passed by the East German Parliament in summer 1990 at the urgent request of members of the civil rights movement to facilitate “the political, historical, and legal reckoning with the activities of the former Ministry for State Security.”⁶⁷ The West German negotiators to the unifica-

tion treaty were “emphatically opposed” to giving this law validity under the treaty, but after a hunger strike by members of the citizens’ movement it was agreed that the unified German Parliament should pass a law on the Stasi files that respected “the basic principles” of the August 1990 law.⁶⁸

The law established a federal office for administrating, sorting, and reconstructing the files, with the federal commissioner for the Stasi records elected for five years. During the first two terms, Joachim Gauck, a pastor from Rostock, served as commissioner, and the office soon came to be known as the Gauck Authority (*Gauck-Behörde*). The Stasi Records Law established an elaborate system of making parts of the Stasi’s files available to restricted and specific audiences. There are different access rights for the Stasi’s victims, the Stasi informers, researchers, and public sector employers. Some parts are more public than others. Those who were spied upon could petition to see “their” files, and from 1991 to 2003, more than two million petitions for access to individual records were filed.⁶⁹ Hundreds of thousands of persons have accessed the Stasi’s knowledge about their personal lives. After seeing their file, people can decide whom to tell about what they read: their family, their friends, or the general public. The law empowers them to decide with whom to share the secret knowledge gathered by the Stasi.

Persons who worked for the MfS, in contrast, were less protected against having their pasts discussed by others. If they worked in the public sector, information on their activities could also be made available to their employers upon request. Churches, political parties, parliaments and governments at local, state, and federal level, and associations could also have their elected officials screened by the federal commissioner (sections 20, 21). In addition, lay judges, lawyers, and notary publics could be screened. The persons to be screened had to be notified, in some cases they had to consent. The employer or the organization would petition the commissioner for a notice (*Auskunft*). The commissioner’s staff would then search the accessible files and issue a notice stating whether there were indications that the employee or official was an informer for the Stasi. If there were no such indications, the commissioner issued a letter stating that there was no evidence in the currently accessible files that the person was a Stasi informer.

If there was evidence that an employee had worked for the Stasi, the commissioner’s staff returned a brief standardized report. The report contained the code name of the informer, where and for how long she worked, whether she signed a declaration of commitment, why she was recruited, whether she received payments, rewards, or awards for the work, how the work ended,

how many reports she wrote, and some information on the contents of the reports.⁷⁰ Photocopies of relevant parts of the files would be enclosed. The employee could get a photocopy of the standardized report and view much of the enclosed material, with the exception of reports she had written about persons. The commissioner would not give a recommendation on how to evaluate this information; his role was to deliver the “facts” from the files. When employers needed advice on how to evaluate files, they could turn to the state commissioners for the Stasi records, who work independently from the federal commissioner.⁷¹

Although the federal commissioner’s office does not evaluate the contents of the files, the Stasi Records Law defines the forms of contact with the MfS that are considered collaboration in the terms of the act. Many official forms of cooperation on the job are excluded from the notice and are thus tacitly marked as morally less troubling. Also, activities for the Stasi that ended before December 1975 — fifteen years before unification — are not to be included in the notice unless they involved the commission of crimes or violations of basic principles of humanity (section 19, para. 1).⁷² If someone had, for example, informed from 1970 until 1974, the employer would still get a notice that “there are no indications” of activities for the Stasi. Any Stasi work by minors and persons who only worked for the Stasi during their military service and did not report on specific individuals would also be excluded from the notice. Neither would the notice include evidence that an employee who informed for the Stasi had been also spied upon because this would violate the victims’ privacy rights. But the employee was free to introduce such evidence in the proceedings.

These examples show that the Stasi Records Law shaped the definition of misconduct by hiding certain forms of engagement with the Stasi from the view of the vetting commissions. The 1975 rule resembles the statute of limitation extending the period of inquiry fifteen years backward from the time of unification, and a deadline in sections 20, paragraph 3, and 21, paragraph 3 prohibits the use of the commissioner’s notices later than fifteen years after the passing of the law, meaning December 2006. These two dates provide the temporal framework for the vetting process even though the unification treaty allows the dismissal of MfS informers for work prior to 1975, and also at points in time after 2006. But without reliance on the notices issued by the federal commissioner, the vetting process is moot.

Persons for whom the federal commissioner had returned a “positive” notice with evidence that they had been informers often felt their case had

been misrepresented. In the notice, their personality is reduced to the declaration they might have signed, to the reports they might have given. In one case, a person had been spied upon for years. Then the Stasi asked him to become an unofficial informer. He initially consented, but then announced his unwillingness to be an informer at their next meeting:

The fact is, I signed this declaration, and right at the next meeting I said I didn't want to do this. So. That was it. And why did I sign it? There are different reasons. It has to do with my entire life before that. Because, I was more of a rebel than someone who would work for the Stasi. I was simply interested in what they wanted to know through me. On whom did they want to snoop? Because I had contacts with different groups, ... and I simply wanted to know what they wanted from me... I was not so naive as to think that if I worked with the Stasi I could find out things that were unclear to me, piece by piece. So I went so far as to say, okay, and then there was a first meeting.⁷³

The excerpts compiled by the federal commissioner only showed that one part of his contacts with the Stasi: "They only had the piece of paper with my signature on it, and they said, he signed."⁷⁴ In his own binder, he now has photocopies of both his files. The "victim file" has many photocopies of letters he wrote to his friends and family while serving in the army, together with various reports on him and friends. The "unofficial informer file" contains his handwritten "declaration of commitment" and reports from meetings in which he delivered no information and declared his unwillingness to work for the Stasi: "During the discussion it could not be achieved that the IM would change his position. It was determined that the IM is written off during the first six months because of his lack of suitability." His "victim file" also contains a rejection of a security clearance "because he refused to be an unofficial informer." Both files taken together provide a story of his encounters with the Stasi that makes sense, but his employer was issued a brief report based only on the informer file. Since he applied to see his "victim file" relatively late, he also could not introduce evidence from that file at his vetting proceeding. There he was hard pressed to explain his apparent eagerness to work for the Stasi, and to prove that he did not deliver any information nor that he intended to do so. He concedes that "this is such a voluminous story. If this is to be worked through in a way that does justice to the person, it would simply exceed the technical capacities of such a commission. Nobody has so much time that they could reconsider all these stories."⁷⁵

The vetting laws tied vetting to an assessment of a person's "personal suitability" for public office. The courts went to great lengths to substantiate the criteria given by the unification treaty and suggested by precedents. The possibility and evaluation of a "personal transformation" along with the change in the political environment is one of the key moral and legal issues in this process. The clause allowing dismissals for non-MfS misconduct expired in 1993, but dismissals for MfS work are possible into the indefinite future. Yet the Stasi Records Law, which regulates the availability of the MfS files for vetting purposes, sets a time frame for the entire process by prohibiting the use of files for vetting after 2006.

VETTING IN THE CITIES

Following unification in October 1990, city administrations faced an entirely new legal system and huge gaps in their budgets. While the universities were concerned about justifying public trust and their legitimacy as elitist institutions, the cities were trying to adapt to a new system that would require massive layoffs and a reorganization of the administration and service delivery at the local level. The issue of popular trust was not paramount, and was addressed only at the upper echelons: the mayor and the directors of administrative departments. Mayors and other local officials had been elected in May 1990, so the democratic legitimacy of the heads of the city administrations was beyond doubt. The vetting for other levels followed a more administrative model and was less public than it was in the universities and the judiciary, for example.

The situations in Greifswald and Dresden were quantitatively different: The Dresden city administration had 18,000 employees in 1990. The Greifswald city hall had just 300 employees, but the restructuring of the public administration moved other departments into the jurisdiction of the city. At one point, the city suddenly had 3,000 employees, but through privatization of services and layoffs, this number decreased to 1,260 at the end of 1997.⁷⁶ Everyone's main concern was preserving municipal jobs, but nobody was prepared to extend this solidarity to people who had cooperated with the Stasi. The former mayor explains:

I called a general meeting for all municipal employees very soon [after being elected]. At that point, there were still 300 employees. And if someone was proven to have worked for the Stasi as an informal collaborator and had denounced people, then he would have to go, he would

be fired. Whoever was on that list and signed, or even received money, had to go.⁷⁷

The vetting process in Greifswald was split into two parts. First, the newly elected officials at the top of the administration reviewed the higher-level employees for Stasi cooperation, for politically motivated aspects of their job performance, and for their position in the SED hierarchy. Almost all department heads had to leave their current positions, but many were later employed in lower positions in the same department.⁷⁸ The replacement of department heads was motivated by both their conduct in the previous administration and the feeling that they would not be capable of leading departments in dire need of change.

In the part of the administration that I headed, almost all department directors were replaced by new people. This does not mean that the old ones were dismissed because of their political record, but because we wanted to establish something new. In the areas of culture, of education, we wanted to set new standards, and this was only possible with new leadership.⁷⁹

Since the schools were under the city jurisdiction—they were later moved to the jurisdiction of the state government—the democratically elected city officials also screened all twenty-two school principals, twenty-one of whom had been SED members, and most of whom were replaced.⁸⁰ From the election of the local governments in May 1990 until the establishment of state oversight over the municipal administrations, local officials often worked in a legal vacuum. This vacuum sometimes turned into a disadvantage when courts reviewed the vetting decisions made during those first months.

The second step was the screening of all other employees for ties to the Stasi, but not for other forms of misconduct. This process took more time because the notices from the federal commissioner's office were coming in very slowly. In order to evaluate employees who had worked for the Stasi, the city formed a small "working group." One of the three members was from the employees' council, one from the human resources department, and one was "someone who knew the Stasi issues quite well,"⁸¹ preferably someone who had participated in the organized dissolution of the city's Stasi headquarters in December 1989. This working group was authorized to make final decisions after interviewing the employees. The group was different from the pluralistic commissions that evaluated judges, university employees, and police officers. It did not include persons from outside the vetted institution; for its

legitimacy it relied solely on the democratic mandate of the top city officials who were involved. The working group viewed its task as an administrative process with individual hearings, the weighing of evidence, and the responsible exercise of discretion. Participants in this process stress that there was no automatic dismissal:

It was important to see whether someone had signed a declaration, how many records were there that showed that he harmed someone? ... But even if someone had signed the declaration, this was not immediately a reason to vote for dismissal. Some were blackmailed into signing, others were indirectly forced, and others did it from their political convictions to do something good for the state. We always examined the individual case.⁸²

The working group either voted that the employee was suitable for continued employment, should be dismissed, or should work in a position with less responsibility and contact with the public. The city screened 1,553 employees, 1,495 of whom had not worked for the Stasi and 58 (3.7%) who had. The working group decided to continue employment for about half of them (28). The other 29 employees (one person had already left) were offered to leave by mutual agreement, and 11 accepted this option. In the end, 18 persons were dismissed; 12 of them sued for continued employment, and 5 of them were successful.⁸³ These numbers are miniscule in comparison to the other sources of job losses in the city administration. In 1991, many social services were transferred to the responsibility of the municipal government, which suddenly had to pay its employees West German wages. In the day care sector alone, about seven hundred employees had to be dismissed in one year: "These things did not have anything to do with justice. Rather, if someone was affected, there was no good reason for it but they could not do anything about it."⁸⁴ Since the number of people dismissed or demoted due to vetting was small in comparison to the general downsizing, there were no concerns that vetting would deprive the city government of irreplaceable personnel. Even very able people had to be dismissed due to budgetary concerns, and with the high level of unemployment, replacements would be easy to find.

In the city of Dresden, far larger numbers of employees had to be vetted. But here, too, the upper echelons of the administration were treated differently from the ordinary employees.⁸⁵ Although this first stage of the vetting process, the screening for non-MfS misconduct, was limited to the upper levels of the municipal administration, the number of employees dismissed

for these reasons is high in comparison to other institutions. These numbers are the result of months of diligent full-time work by fifteen members of a preliminary vetting commission who sifted through the personnel files and SED archives, conducted hearings, and recommended 11 dismissals in 1990, 67 in 1991, 148 in 1992, and 21 in 1993. This demonstrates that screening for abuses of power by SED functionaries required a significant commitment. But municipal officials felt that this scope of their vetting procedures was justified because the citizens would otherwise not trust a city administration that had implemented locally what the SED had planned in Berlin and Dresden.

In 1993, the unification treaty clauses allowing for dismissals for non-MfS related misconduct expired, and the vetting process shifted to the MfS files. The notices from the federal commissioner were trickling in, and a regular personnel commission was formed to continue the vetting process in 1992. The members of the commission were almost exclusively drawn from within the human resources department. The commission dealt with about 509 cases in depth. The employees about whom there was evidence of activities for the Stasi were invited to a hearing with the members of this commission. The relevant files and the minutes of the hearing were then discussed in the commission. In 264 cases (52%), there were no sanctions; 201 employees (39%) were dismissed, 30 of them without prior notice; 44 employees chose to leave by mutual agreement. Thus only 18% of those eligible to leave by mutual agreement did so, and the others “almost uniformly” sued for reinstatement.

The procedures adopted by the city administrations followed the administrative model of vetting. The commissions were primarily staffed with members of the administration: the human resources department in Dresden, and representatives of the human resources department, the employees' union, and the mayor in Greifswald. The procedure in Greifswald even did away with the distinction between the commission's recommendations and a review and final decision by the responsible administrator. Participants describe this procedure as adequate for the needs and context of the municipal governments. These institutions primarily delivered social services, administered welfare programs, and implemented the policies adopted by the city parliaments. Thus the stress on the employees' democratic credentials and the citizens' ability to develop trust in them was less pronounced than it was in discussions about the vetting of police officers, university employees, teachers, and the judiciary. All that the new administration asked from most low-level municipal employees was an outward behavioral adaptation and a willingness to study and apply the new regulations diligently. The democratic credentials

of the elected heads of the municipal administration would suffice for guaranteeing a democratic overall direction of the municipal administration. The only group of lower-level employees who were explicitly denied the “second chance” of behavioral adaptation were those who had not only worked for the Stasi but also actively harmed fellow citizens: “If someone caused damage to somebody else, by their work with the Stasi or whatever, it really doesn’t matter how they conducted themselves afterwards. They have to leave their position, leave the municipal administration.”⁸⁶

The vetting process was more limited in the municipal administrations than it was elsewhere, and it was specifically geared to the requirements of these institutions.

VETTING IN THE UNIVERSITIES

Over the course of the fall 1989 semester, the universities’ role as pillars of the SED regime was gradually undermined. The ensuing crisis of legitimation soon triggered calls for vetting as the ritual purification from the corrupting influence of the SED and Stasi on research and teaching. During October 1989, local SED organizations tried to save their position by proposing reforms and promising to refrain from interfering with the university administration. Three days after the opening of the Berlin Wall, on November 12, 1989, the University of Greifswald’s department of Marxism and Leninism petitioned the university president for its own dissolution.⁸⁷

This self-dissolution marked the beginning of a large-scale restructuring and downsizing. At the same time, the universities tried to shed their roles as participants in the ideological streamlining of the GDR elites and in the repression of those who dissented. The universities wanted to reinvent themselves as quickly as possible as independent and nonpolitical institutions for research and learning, and this required a thorough vetting process. The percentage of MfS informers in the universities was small in comparison to other sectors, but the influence of the SED and the access of the MfS to the universities’ officials were undeniable. A person whom the MfS recruited when he was a student recalls:

It was at the end of the first year, in spring. I had a lecture with the professor who was chair of the department at that time. And before the lecture he said I should come with him to his office. So he led me there, and a Stasi officer was sitting there, who wanted to recruit me. And the professor, he just went back and gave the lecture. And there I was, sitting there with this man.⁸⁸

In this case, the MfS used the authority and implied authorization of the department chair to try to intimidate the student into signing with them. This method of recruitment was not unique. Universities also expelled students who had become too rebellious; and party membership and loyalty were important ingredients in many academic careers.

As in other institutions, the moral demands for vetting intersected with the necessity to close down some academic divisions and reduce staff in others. Academic departments that had become superfluous were dissolved, and their staff and faculty dismissed. In Greifswald, six departments were dissolved in the so-called unraveling (*Abwicklung*),⁸⁹ and the fact that some of them were later reopened raised the question of whether wholesale *Abwicklung* was used to circumvent the requirement of individual review before dismissing employees. In Dresden, *Abwicklung* affected an even larger percentage of employees. All departments in the social sciences and humanities were dissolved in this way, and some were, controversially, later reopened with new personnel. The social sciences and humanities were often portrayed as the epicenters of ideological corruption. The forty-three unofficial MfS informers that the *Greifswald Commission of Inquiry* had found among university personnel were spread across all departments but were concentrated in the departments of Marxism/Leninism (7.9% of the departmental staff), northern European area studies (11.4%), and history (5.1).⁹⁰ But the MfS had informers almost everywhere and was striving to improve: "In spite of a good yield of information from the medical school, further gaps in the web of IMs are to be closed in 1989 in order to avoid surprises."⁹¹ Among the 2,700 students, 34 (1.3%) were informers, most of them in the physics and medicine programs.⁹²

Yet the downsizing process was a more immediate threat to more careers than any conceivable vetting process would have been. Dresden Technical University and its branches had 9,000 employees in 1990, only 3,400 of whom could stay. In the end, vetting played a quantitatively small role in the process of personnel reduction: at the beginning of the vetting process, 3,000 employees had already left the university through *Abwicklung*, mutual agreements, or dismissals. And among the 5,000 employees that had to be laid off, only 2% were dismissed as a direct result of the vetting process.⁹³ In Greifswald, the personnel reduction was less drastic, from 5,650 to 4,000 and then to 3,600 in 1998. Yet there, too, employees soon started to leave if they saw a chance on the job market or knew they would not pass the vetting process: 810 left voluntarily in 1991.⁹⁴ The vetting process was not contributing much to the personnel reduction in quantitative terms, but it introduced some measure of moral equity into the downsizing process:

It was clear that a large number of the university's employees would need to leave.... And then there was the issue: if hundreds of employees have to be laid off, maybe those who were politically compromised, and those who hindered other people's advancement in the university, and those who had taken part in the political repression of students should be the first to be laid off.⁹⁵

Conversely, vetting would ensure that those who stayed were certified as reliable and trustworthy members of the "new" university and had not taken part in the abuses of "old." Members of the university were especially keen to find out who among them had informed for the Stasi, and they did not want any informers to be participating in academic self-government. The academic senate formed an integrity committee and the medical school's newly elected council resolved in its first meeting in April 1990 to ask each member to sign a declaration stating, "I have never been a *secret* informer for the former Ministry for State Security (MfS), have never signed a declaration of collaboration with the MfS for the purpose of delivering secret information, and have never received financial or other rewards in return for such cooperation," and to agree to have the files examined "by an elected and independent commission according to applicable law."⁹⁶ This declaration of integrity concentrated on the Stasi, and on the provision of secret information to the Stasi. Presumably, many who voted for this declaration had been SED members, a number of them were SED functionaries, and some would have provided information to or taken orders from the Stasi as part of their jobs. The university senate declared this step of the council permissible but warned against narrowing the focus to secret informers:

The Senate has been asked to disclose the MfS cooperation of members of the university in front of the Integrity Committee of the Senate. We declare that we are not authorized to do so. Moreover, we are not willing to distinguish between the innocent and the guilty by such a general pronouncement of guilt or acquittal. We expect all members of the university to seriously ask themselves where they have failed in the past and to what degree they were actively or passively involved in the injustices of the SED regime or in the ideological deformation of research and teaching.⁹⁷

Yet in a situation of increasing competitiveness and job insecurity, open discussion about responsibility for past injustices did not take place. With unification in October 1990, the initial impulses towards vetting and reform

acquired a legal basis. The state governments, which are responsible for the public universities, each passed a Law on the Renewal of the Universities [*Hochschulerneuerungsgesetz*] to regulate restructuring and vetting processes. There were three steps: First, in the vetting process, all members of the university would be evaluated regarding their political and moral integrity. Then they would be evaluated regarding their professional qualifications. Finally, the remaining jobs were matched with the remaining candidates. No job within the university was reserved, and everyone had to reapply for the positions they had already held.

By putting the vetting process first, the governments wanted to ensure that those who were “deeply entangled in the system” would indeed be the first to be laid off regardless of their professional qualifications. However, the sequencing was thrown off track because the January 1993 deadline for easier dismissals laid down in the unification treaty was too soon for the federal commissioner’s office. It had received screening requests for 86,526 employees—about half of all the queries filed to date—and had only responded to one third of these queries by the end of 1992.⁹⁸ The academic review had been scheduled for spring 1992, so that dismissal notices could be issued in the fall. Since a rigorous vetting process would be impossible without the notices from the federal commissioner, the local vetting commissions started issuing evaluations with the reservation that the federal commissioner’s notice had not yet arrived. These preliminary evaluations were mainly based on the employees’ own admissions. Thus, some who had in fact cooperated with the MfS secured jobs and would only be dismissed years later when the notices arrived from Berlin. As a consequence, the three steps of the personnel renewal process did not occur in a neat sequence. Sometimes the steps overlapped, and often step one was completed long after step three.

The university vetting commissions in Saxony and in Mecklenburg and Western Pomerania were composed of members from within the university, from civil society, and legal experts. Officials insisted on a balanced mix of outsiders and insiders. The “insiders” were sometimes self-selected and only later elected by their peers in the university. The outsiders, appointed by the state parliament or the state government, were often legal experts and, as such, they were West Germans. The mixed composition of the commissions was supposed to legitimize them to different audiences with different concerns. The members who were drawn from within the university considered themselves peers of those whom they were evaluating. They were expected to understand the context of the actions and the ethical choices. Many of these insider members had worked on the committees overseeing the preservation

of the MfS files in December 1989 and thus had expertise and experience in evaluating those files. In some cities, members of the vetting commissions apparently even knew which university employees had worked for the Stasi because they had seen the Stasi's own lists in December 1989.⁹⁹ They cite their involvement in the 1989 movement as a legitimizing factor for their membership in the vetting commissions, but take care not to describe themselves as victims of the SED regime or the MfS.¹⁰⁰ The role of the outsiders, often lawyers from West Germany, was to bring the elements of emotional distance and legal expertise to the table:

They also gave advice about how to proceed. I mean, we did not have the rule of law in the GDR. And they came from a part of Germany where there was a tradition of the rule of law for decades. So they brought these experiences into the commission.¹⁰¹

In Saxony, the vetting commissions were called *personnel commissions* and had fifteen members: seven permanent members, including university employees and public figures, and eight nonpermanent members elected by the members of the department that was to be screened.¹⁰² In Mecklenburg and Western Pomerania, the vetting commissions were called *Ehrenkommissionen*, best translated as “honor” or “integrity” commissions. Eight of their eleven members would be elected from within the university (four faculty, two students, two staff), and the other three members, usually lawyers, were appointed by the state parliament.¹⁰³ In both states, a substantial number of commission members were elected by their peers, whom they would be evaluating. Yet the elections often ratified a prior informal selection process. The government officials preferred persons whose own commitment in 1989 would make them proper representatives of the new regime. The regulations in Mecklenburg and Western Pomerania excluded from serving on the commissions all those who had worked for the MfS. There the government also instructed the chairs of the several vetting commissions that “no former SED members should work in the integrity commissions”¹⁰⁴ although this suggestion had no firm legal basis. In Saxony, candidates for the commissions were initially hand picked by officials and people whom they trusted: “We had some of them screened by the Gauck Authority. And then we asked them for further suggestions of persons who should be on the commissions.”¹⁰⁵ This process produced twelve hundred members of personnel commissions, only two of whom later turned out to have been Stasi informers.¹⁰⁶ The selection process was, in short, a mix between the democratic legitimacy of an elec-

tion by peers, and a self-selection process that favored those who had associated themselves with the 1989 movement without considering themselves as victims. The outside members added elements of distanced impartiality and knowledge of the legal rules.

The first step in the commissions' work was to draw up questionnaires that all employees had to answer. Failing to do so would result in immediate dismissal. They asked about a wide range of political and social activities and privileges. Yet almost everyone's attention focused on one question or its variant: "Have you consciously cooperated with the former MfS or any other intelligence service?"¹⁰⁷ Or, in Saxony: "Have you ever, officially or unofficially, . . . worked for the Ministry for State Security or the counterintelligence department of the Defense Ministry of the German Democratic Republic, or have supported their activities in any way?"¹⁰⁸ The questions had to be answered truthfully, the employees were told; otherwise they might be liable to dismissal for lying to their employer (and the vetting commission). The legality of the questionnaires and the questions on MfS contacts was initially disputed but was later confirmed by the courts.¹⁰⁹ As discussed above, the questionnaires yielded few admissions of Stasi work. Lying on the questionnaire alone would normally justify dismissals, but in light of the high numbers of "cheats," both the vetting commissions and the courts were reluctant to press the issue: "If 80% of those entangled in the system did not tell the truth, we could not simply hold this against 80% of the people, right?"¹¹⁰ Here the numbers mattered for the decision not to penalize harshly cheating on the questionnaire: the vetting commissions and courts were not ready to attach substantial sanctions to conduct that was empirically "normal," even though this normality was morally disturbing.

After comparing the returned questionnaires with the personnel files, the commissions decided which cases showed indications of misconduct. In these cases, employees were invited to a hearing. Misconduct, according to the bylaws of the Greifswald integrity commission, was:

any deliberate act by which the employee has actively and in an elevated position helped to implement the policies of the regime of the former GDR, or any act, omission, or acquiescence by which the employee has used the political system to cause others personal or professional disadvantages that were not justified on professional grounds.

Examples of misconduct included possessing high positions in GDR political parties, and party and other leadership positions within the university

hierarchy. Examples of grave misconduct included work for the Stasi and causing the relegation of students for political reasons.¹¹¹ Where there was no indication of misconduct, the case was closed and the employees were notified that they were evaluated positively, pending the notice from the federal commissioner. In all other cases, the employees were invited to hearings at which they were confronted with evidence from the files, asked to explain details, and given the opportunity to tell their side of the story. The hearings have been generally described as fair—even by persons who did not agree with the conclusions reached by the commissions. Still, “people who knew one another were sitting on different sides of the room. And someone who by chance sat on one side of the room had the right to ask the one on the other side questions about his life and his travels. This was not a pleasant situation.”¹¹²

Throughout the process, information on the cases was kept confidential. In spite of this, there were leaks and indiscretions, as can be expected when people know one another and there is much at stake. The confidentiality frustrated those who expected the commissions to clarify the participation of those responsible for political repression and discrimination, and it also made it hard for the employees to evaluate the work of the commissions:

The one big problem with the integrity commission was that you did not see what it was doing. You only saw the results when people suddenly had to leave the university. Or when people were not eligible to apply for the new jobs.... From the effects you could see, there must have been something, but you never knew what the vote was based on. And this created space for new rumors.¹¹³

Without knowing the details of a case, it was impossible to gauge the standards and the consistency, so that it became possible for some to declare, “I don’t think they had any standards at all.”¹¹⁴ The tension between the confidentiality appropriate to employment matters and the transparency necessary for the evaluation of the commissions’ work seems inescapable.

Both in Saxony and Mecklenburg and Western Pomerania, the vetting commissions only made recommendations that were then reviewed by the ministries of education. In Saxony, the personnel commissions could vote “suitable” or “unsuitable.” If the commission was deeply divided, the minority could file a dissenting vote with the minister, who would then pay particular attention to the case.¹¹⁵ In Mecklenburg and Western Pomerania, the commissions could recommend a range of votes from “no misconduct” to “slight misconduct, no consequences,” and “temporary disqualification from participation in academic self-government” to “ordinary dismissal” and “imme-

diate dismissal”—altogether eight different votes. The greater differentiation allowed the commission to express moral disapproval of an employee’s conduct short of recommending dismissal. The votes in between “no misconduct” and “dismissal” were disadvantages in the later stages of the restructuring process: given the choice between a candidate with a “no misconduct” evaluation and another with a “disapproval,” the university often preferred the former. But regardless of the practical consequences, employees who received such votes were often troubled by the suggestion that they had committed misconduct.

At the University of Greifswald, most employees were found to have committed no misconduct. As of February 1995, with 1,873 notices from the Stasi files commissioner pending, 3,936 of all 4,415 vetted employees (89%) received a “no misconduct” vote. About 1.7% were recommended for dismissals, and the rest received votes in between the two ends of the scale.¹¹⁶ Employees from the social sciences and the humanities received the least favorable evaluations: only 68% were granted “no misconduct,” compared to 80% in the natural sciences and 93% in the medical school. Also, 20% of the professors but only 3% of the mid-level researchers were recommended to leave the university.¹¹⁷ These numbers reflect the differences in the intensity of SED and Stasi influence among the disciplines, and the high influence of SED loyalty for professional advancement in the GDR.

The university vetting commissions covered thousands of cases, most of them in 1991 and 1992, when they worked full time. Given the time pressure and the necessity of developing a consistent practice, the commissions categorized different forms of misconduct, compared them according to severity, and matched them with plausible votes. In Greifswald, the commission drew up tables with guidelines for evaluating different sorts of misconduct, such as job-related Stasi contacts, having been a member of the university-wide SED leadership, and active participation in politically motivated disciplinary proceedings.¹¹⁸ The commission seems to have given the votes indicated in the table unless the specifics of the case counseled for a more or less severe vote. So the probable range of the vote was clear before an employee appeared in the hearing, but the specific vote was not.¹¹⁹ Since persons who had served in similar positions often received the same vote, some tried to argue that the commission had decided how to vote simply based on the formal position of an employee in the hierarchy. This suspicion was fueled by the commission’s practice of using generic templates for formulating the reasons accompanying the evaluation.¹²⁰ This sometimes conveyed the impression that the particulars of a case had not been appreciated.¹²¹

At the University of Greifswald, 40% of the Stasi informers who had to leave the university did so through a mutual consent arrangement, relinquishing their right to challenge their evaluation. Although there was no legal basis for appealing to the vetting commission to review a case, the commission made it clear that it would welcome such appeals and take them very seriously. The informal appeals procedure was used by eighty-seven persons, 2% of those evaluated up to that point. In fourteen cases (16%), the commission changed its initial evaluation. Among those who brought their cases to the labor courts, very few won, a few of them lost, and the others entered into settlements with the university or the state government. In Dresden, two hundred fifty dismissals for various reasons in the faculties of engineering and natural sciences led to two hundred lawsuits, of which the employer lost thirty-three and won thirty-nine. In all other cases (64%), the university or the state entered into a settlement.¹²² Given the occasionally erratic labor court jurisprudence and the universities' categorical unwillingness to reintegrate those that the vetting commissions had voted unsuitable, settlements were an attractive solution for the employers.

Unlike most other vetting commissions, the university vetting commissions dealt solely with the employees' conduct before 1990. The Greifswald commission was formally authorized to investigate conduct up until March 1991, but members of the commission said they did not feel responsible for investigating anything after November 1989. This helped the commission to counter reproaches that they were a tribunal on other persons' political opinions. For the commission, conduct prior to 1989 counted, and the political opinions that individuals held when they stood before the commission were irrelevant. If the commission could not honor genuine personal transformations, it also did not reward opportunistic adaptations. The decision not to inquire about post-1989 conduct was made before the labor courts started to stress precisely this factor.

The university vetting commissions in their different shapes were parts of a larger wave of layoffs at the universities. The commissions added small numbers of dismissals but an important element of moral fairness to the larger process of downsizing. Still, they could not attain the proclaimed goal that the first to go would be those whose prior misconduct disqualified them from holding positions in the public sector. Sizeable numbers of employees had lied about their involvement with the MfS. Due to the necessities of sequencing the different steps of the renewal process, they kept their jobs for some more years. When they were found out, they had a better chance of retaining their jobs than those who had admitted their involvement on the questionnaires.

The commissions were composed of insiders and outsiders so as to combine the experiences and understanding of the members of the university with the emotional distance and legal skills of West German lawyers and others who had not been involved in the institution. Although some hoped that the vetting process would help the universities to “face the past,” this did not occur. On the one hand, the process took place within the parameters of the labor law, which bars public discussion of the cases examined by the commission. Neither the votes nor the particulars of any case were made public. On the other hand, those who were free to talk about these issues, the employees themselves, did not do so because their careers and their reputations were at stake. Those who passed the commissions’ muster could claim a legitimate status within the German university system. A favorable evaluation in terms of the vetting criteria allowed those who kept their jobs to disassociate themselves from past injustices, often unjustifiably so. Yet as the new professors from West Germany came to the universities, those East German researchers and professors who could keep their jobs could point to the vetting commissions to remove suspicions that their West German colleagues never had to face.

VETTING IN RELATIONSHIP TO OTHER TRANSITIONAL JUSTICE POLICIES

How did vetting relate to other transitional justice policies? I will briefly consider the relationship between vetting and prosecutions, truth telling, and rehabilitation. First, vetting and prosecutions remained separate. Yet both policies implicitly mark and affirm the distinction between acceptable and unacceptable behavior. They participate in the retroactive drawing of a moral landscape. The choices they make in framing areas of responsibility and focusing on certain institutions but not on others shaped the public debate on political and moral responsibility. The more vetting is understood as a sanction for past misconduct—and not as assessing current suitability for public sector employment—the more vetting and prosecutions are understood to be on a sliding scale. Thus the failure to prosecute those who were politically responsible—for example the upper echelon of the MfS—while dismissing from mundane public sector jobs the low-level unofficial informers is widely viewed as incoherent.¹²³ This view presumes that vetting is a milder form of sanction than criminal punishment but follows the same moral logic. Impunity for those who were the superiors of those whose misconduct was examined by the vetting commissions accordingly undermines the legitimacy of the vetting process.

Second, vetting and truth telling stand in an uneasy relationship. The desire to know who was an informer, and to know who has abused power, is closely related to the wish to deny those people public sector employment. Yet vetting did not lead to more knowledge about the patterns of collaboration. It provided “sanctions” without publicizing what they were based on, thereby encouraging rumors. Unless those who were vetted chose to go public, the facts in each case were strictly confidential. This has been criticized as undermining the justice of the vetting process:

If you have the rule of law and there is a legal statute and a court makes a finding and says that this person deserves this or that penalty, this is clear to the public. This is the purpose of sanctions for persons who have done something wrong. But in the Integrity Commission, everything was watered down. Outsiders could really not see what was going on.¹²⁴

The embedded secrecy about past misconduct reinforced the understanding that one’s past is strictly a private matter. While the vetting process might have encouraged more secrecy, it profited enormously from the institution whose task it was to create managed publicity for important aspects of the GDR past: the federal commissioner’s office for the Stasi records. The public sector employers are only one constituency for the federal commissioner’s office. Requests by individuals, journalists, and researchers are also answered within the terms of the law. This institution would not have existed without the concerted efforts to first prevent the destruction of the MfS files and then prevent their transfer into the federal archives. Accordingly, the relative coherence of the vetting policy depended on the prior decision to make the MfS files available for different purposes. The existence of a federal agency devoted to managing the MfS files was not matched by similar efforts to systematically work through and manage the SED files. Thus the laudable work of the federal commissioner risks narrowing the focus of dealing with the past to the MfS. But there is more to the past than what is in the Stasi files, and even the state commissioners for the Stasi records lament that those who did the dirty work for the MfS were being held responsible while those who had the political responsibility for the giant security apparatus were not.¹²⁵ Vetting benefits from a general policy of exposing the truth about one institution at the center of the security apparatus, but it does not by itself lead to more truth telling.

Third, when people contemplated vetting the public sector, they initially envisioned dismissing those who had caused harm to others and promoting those who had been harmed.¹²⁶ Vetting and rehabilitation were seen as

two sides of the same coin. The mandates of some vetting commissions also included a rehabilitation component. Yet purposeful political discrimination in the GDR was often hard to prove later. Even where the evidence might have been sufficient, the moral imperative of rehabilitation in the form of promotion or rehiring competed with the imperatives of downsizing. The legal basis for such affirmative action was also weak. In addition, there is the concern that the vetting process did not identify all those who had harassed colleagues for political reasons, and that those who had suffered would not want to come back to the same workplace. The trustworthiness of the public sector is still uneven and fragile, especially from the perspective of those who had been harassed while working there.¹²⁷ Thus, efforts at reinstating employees to jobs from which they were removed for political reasons were present at the beginning of the vetting process. As jobs became increasingly scarce, the competition among those who had managed to keep their positions sidelined such concerns. Professional rehabilitation strategies can well be a complement to vetting programs, but they are bound to meet resistance where jobs are scarce and insecure. Instead of trying to offer the job that was once lost, it might be more appropriate and feasible to offer additional skills training to those who had been disadvantaged.

CONCLUSION

The vetting process in unified Germany was regulated by one general norm in the unification treaty, and yet the practice was uneven across sectors, states, and administrative departments. Institutions that required higher levels of popular trust in their moral authority, such as courts and universities, generally selected more demanding procedures. Their pluralistic vetting commissions were composed of institutional insiders as well as representatives of civil society and legal professionals who were expected to ensure the impartiality and integrity of the vetting process. In other parts of the public sector, such as in the municipal administrations, the vetting process was differentiated according to the employees' level of responsibility and public visibility. The commissions were formed from within the institution without elections. They viewed their work as purely administrative. In the four institutions examined here, the numbers of dismissals due to the vetting process were small in comparison to the job losses caused by shrinking public budgets. The most significant category of misconduct examined by the vetting commissions was collaboration with the MfS. Available numbers suggest that on average 25% to 45% of those who were listed as MfS informers had to leave the institution.

Many opted for ending the employment by mutual agreement, which saved them the embarrassment of having been dismissed but also deprived them of an opportunity to challenge the dismissal in court.

The two most contentious issues were the rationale for vetting and, closely related, the vetting criteria. Vetting was first proposed in fall 1989 and started, sometimes informally, in the spring of 1990. At that time, vetting was conceptualized simply as a response to past misconduct, and not much thought was given to how a person's views and conduct changed after 1989. The legal basis for vetting, in contrast, framed the policy as an attempt to assess the employees' current and future reliability in a democratic public sector. This disagreement was virtually immaterial in 1990, when the unification treaty was ratified. But since the vetting process took much longer than projected, the difference between these two rationales grew stark. The contrast focused on several crucial questions: What is the relevance of someone's conduct after 1989 in comparison to their misconduct before 1989? Can old misconduct be redeemed by a rapid personal transformation in 1990? Is such a transformation even possible? With a focus on an employee's suitability, pre-1989 conduct fades in its importance as time passes. Misconduct in 1985 might have constituted a sufficient presumption of unsuitability for public sector employment in 1992. Yet after five more years of diligent democratic administrative work, this same employee might pass the suitability test. She was given a second chance, and she took it. Vetting according to the suitability rationale produces a progressive leniency.

If vetting is seen in a more strongly retributive framework, in contrast, this progressive leniency is not permissible. The same form of misconduct should meet the same form of sanction, no matter whether it is discovered in 1992 or in 1997. This view becomes all the more plausible if one considers why some cases were dealt with in 1992 and others in 1997. Oftentimes, this might be a matter of pure chance. In these cases, progressive leniency is simply a random unfairness. Yet those few who did not cheat when they filled out the vetting questionnaire had their cases expedited to facilitate earlier decisions. Relaxing the criteria over time punishes them for being forthcoming instead of giving them credit for their truthfulness. Thus if the vetting process takes place over a longer period of time, as the statutory fifteen years in Germany, it is important to choose standards that do not carry within them the seeds for troubling inconsistencies over time. Standards that rely on the employees' current attitudes as a measure of how far they have distanced themselves from the past also run the danger of rewarding opportunistic adaptations and judging employees according to their views rather than on the basis of their

(past) deeds. Vetting according to the rationale of “personal suitability” tries to weed out employees who might not be able to act according to democratic and liberal principles. Vetting according to the quasi-retributive model, in contrast, focuses on persons who abused power in the past. These two groups might overlap, but they are not identical. Nor can courts convincingly square the circle by declaring that past misconduct is a sufficient indicator of current unsuitability. Bad democrats can have “clean” past records, and there are others whose past misconduct was largely a result of their obedience, and who can be well integrated into a democratic administration. Both vetting rationales address important concerns that cannot be sufficiently dealt with if the vetting policy is based on only one or the other rationale.

Although vetting was meant to identify various forms of noncriminal misconduct, it was widely understood to be synonymous with the search for MfS informers. This identification is a result of a narrowing of the vetting focus in response to the availability of evidence and the criteria introduced by the laws. The focus on the MfS does not reflect an initial judgment of the relative responsibility for injustices of the MfS, the SED, and other organizations. However, the singular focus on unofficial MfS informers for pragmatic reasons implicitly cast this group of people as the main culprits. Other forms of MfS collaboration as well as the abuse of power by the SED, the trade union federation, and other organizations receded in importance behind the character of the secret MfS informer. The party’s “shield and sword” is shielding the party even after its own demise.

NOTES

- 1 Gerhard Bartels, Party of Democratic Socialism [*Partei des Demokratischen Sozialismus*] (PDS) member of the state parliament, interview by author, Greifswald, Germany, January 23, 2004. This succinct phrase captures the widespread imagination that people's lives were split between "before the change" and "after the change." The splitting of life stories is often seen as a powerful reason for vetting because vetting sets the "first life" in relation to someone's "second life."
- 2 The "new states" of the former GDR are: Brandenburg, Mecklenburg and Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia. The state of Berlin is a merger between former West Berlin and East Berlin. Vetting policies in Berlin were somewhat different than in the other "new states" because the Eastern institutions were seen as duplicates of the already functioning Western institutions. On vetting in Berlin, see Inga Markovits, *Imperfect Justice: An East-West German Diary* (Oxford: Oxford University Press, 1995).
- 3 The vetting commissions' focus on MfS informers is presumed rather than explained in much of the literature on vetting. See Peter Quint, *The Imperfect Union* (Princeton: Princeton University Press, 1997); James McAdams, *Judging the Past in Unified Germany* (Cambridge and New York: Cambridge University Press, 2001); and Anne Sa'adah, *Germany's Second Chance: Trust, Justice, and Democratization* (Cambridge, MA: Harvard University Press, 1998).
- 4 The best overview of vetting in different sectors, with the most reliable numbers, is Hans Hubertus von Roenne, "Die Praxis der Entscheidung über die Übernahme von Personal in den öffentlichen Dienst im Beitrittsgebiet während der Übergangsphase nach 1990—unter Berücksichtigung der Bereiche der Justiz, der Bildung und der Polizei am Beispiel der Landesverwaltungen in den neuen Ländern und Berlin," in *Materialien der Enquete-Kommission "Überwindung der Folgen der SED—Diktatur im Prozess der deutschen Einheit,"* vol. 2/1 (Baden-Baden: Nomos, 1999), 544–649. Other chapters in that volume are also useful but tend to focus on the bureaucratic perspective from above. Where attitudes and evaluations are gauged, this is usually done through questionnaires, as by Monika Schlachter, "Justitielle Aufarbeitung am Beispiel der Arbeitsgerichtsbarkeit," in *ibid.*, 650–754.
- 5 See von Roenne, "Die Praxis der Entscheidung."
- 6 *Ibid.*, 546.
- 7 Dresden municipal government, response to questionnaire, January 2004. Privatization accounts for at least 2,400 additional jobs.
- 8 Statistics of the Ministry of Education, Mecklenburg and Western Pomerania; and Rektor der Universität Greifswald, *Rechenschaftsbericht 1998* (Greifswald, 1999), 16.

- 9 The GDR districts of Erfurt, Gera, and Suhl, which correspond to the current state of Thuringia, had a police force of about 12,000. The border and railway police are included in this number, but were moved to separate units in 1990 and are not included in the total of 6,700 as of July 1991. Personalüberprüfungsausschuss für die Thüringer Polizei, *Abschlussbericht* (Thüringer Innenministerium, 1996), 33–34.
- 10 Ibid., 15.
- 11 Von Roenne, “Die Praxis der Entscheidung,” 579, 584.
- 12 This was an implicit justification brought up by many interviewees, for example Birgit Dahlenburg, interview by author, Greifswald, Germany, January 8, 2004.
- 13 Jürgen Kohler, interview by author, Greifswald, Germany, January 8, 2004.
- 14 Jörn Mothes, state commissioner for the Stasi records, interview by author, Schwerin, Germany, January 20, 2004. Also see the court decisions as discussed below.
- 15 The coordinator of the university vetting commissions in Mecklenburg and Western Pomerania reports that 99% of the recommendations were implemented, but that the commissions were closely coordinating their standards in monthly meetings organized by a representative of the Ministry of Education; Thomas Baden, interview by author, Schwerin, Germany, January 19, 2004. In Saxony, the Ministry of Education disagreed with the commissions’ recommendations in less than 5% of the cases; Lutz Gilbert, interview by author, Dresden, Germany, January 15, 2004.
- 16 See Thüringer Polizei, *Abschlussbericht*, 23; and Jürgen Hansen, interview by author, Mecklenburg and Western Pomerania Ministry of Education, Schwerin, Germany, January 20, 2004.
- 17 Schlachter, “Justitielle Aufarbeitung am Beispiel der Arbeitsgerichtsbarkeit,” 659.
- 18 Von Roenne, “Die Praxis der Entscheidung,” 552.
- 19 In Brandenburg, 100 teachers left before September 1992 because of admitted work for the MfS. During the later screening process with the benefit of the information from the Stasi records commissioner, another 1,139 teachers were identified as having worked for the MfS. Even accounting for possible confusion among employees about the definition of “having worked with” the MfS, the rate of admitting collaboration is unlikely to be higher than 10%. In Sachsen-Anhalt, the numbers are strikingly similar: about 100 teachers had admitted to MfS work, and 1,140 were later found out to have worked for the MfS. See von Roenne, “Die Praxis der Entscheidung,” 581, 588.
- 20 Thomas Meyer and Jürgen Behnke II, interviews by author, Greifswald, Germany, January 6, 2004, and Dahlenburg, interview.
- 21 Federal Labor Court, decision of December 14, 1995, 8 AZR 356/94.
- 22 Interview by author, Greifswald, Germany, January 2004.
- 23 Calculated from Innenministerium Mecklenburg-Vorpommern, *Anfragen der Landesbeauftragten bei der Bundesbeauftragten für die Unterlagen der Staatssicherheit*, 1996 and 2003.

- 24 Calculated on the basis of statistics provided by the Mecklenburg and Western Pomerania Ministry of Education.
- 25 Meyer and Behnke, interviews.
- 26 Bartels and Mothes, interviews.
- 27 Mothes, interview.
- 28 This was the apparent policy in the state governments. The city administrations in Dresden and Greifswald screened officials with higher political responsibility for all possible forms of misconduct, and the lower-level staff only for MfS work. Mothes, interview; Jürgen Drenckhan, former deputy mayor, interview by author, Greifswald, Germany, January 6, 2004; and H. Scheffel, interview by author, Dresden, Germany, January 8, 2004.
- 29 Bundesministerium des Inneren, "Ausfüllung der durch den Einigungsvertrag vorgegebenen Rahmenregelungen zur personalpolitischen Erneuerung von Verwaltungen durch landes- und bundesrechtliche Regelungen, Verfahren und Kriterien," in *Materialien der Enquete-Kommission "Überwindung der Folgen der SED—Diktatur im Prozess der deutschen Einheit,"* vol. 2/1 (Baden-Baden: Nomos, 1999), 413.
- 30 Von Roenne, "Die Praxis der Entscheidung," 602ff.
- 31 See Thüringer Polizei, *Abschlussbericht*, 24.
- 32 The Ministry of Education in Saxony even insisted that it would not issue figures on the vetting process because they "don't say anything" about a process that emphasizes individualized review. Gilbert, interview.
- 33 Scheffel, interview.
- 34 Mothes, interview.
- 35 Reinhold Glöckner, former mayor, interview by author, Greifswald, Germany, January 6, 2004.
- 36 Armin Mitter and Stefan Wolle, ed., *Ich liebe Euch doch Alle: Befehle und Lageberichte des MfS Januar–November 1989* (Berlin: Basis Druck, 1991), 91–92.
- 37 Reinhard Glöckner, *Die Wende in Greifswald aus meinem Erleben und in meiner Sicht* (Greifswald: self-published, 1993), 27.
- 38 For the Stasi in Fall 1989 and after, see Michael Richter, *Die Staatssicherheit im letzten Jahr der DDR* (Köln: Böhlau, 1996). Many of the local citizens' committees that occupied the Stasi headquarters published reports on their findings; see, for example, *Abschlussbericht des Untersuchungsausschusses der Stadt Greifswald* (Greifswald, 1990), hereafter cited as *Greifswald Commission of Inquiry*.
- 39 The Stasi infiltrated opposition groups until November 1989. On the central level, see Mitter and Wolle, *Ich liebe Euch doch Alle*, 239–51; for the local level, see *Greifswald Commission of Inquiry*, 24.
- 40 Hinrich Kuessner on November 22, 1989. Quoted in *Greifswald Commission of Inquiry*, iii.
- 41 Ibid.

- 42 Ministry for State Security, Guideline 1/68, quoted in Landesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR, *Handreichung für personal-führende Stellen des Öffentlichen Dienstes in Sachsen-Anhalt zur Überprüfung von Beschäftigten und Bewerbern auf eine Tätigkeit für das MfS*, 2nd ed. (Magdeburg, 1997), 21; <http://www.landesbeauftragte.de> (accessed December 20, 2003).
- 43 For the numbers, see Charles Maier, *Dissolution: The Crisis of Communism and the End of East Germany* (Princeton: Princeton University Press, 1997), 47.
- 44 MfS Guideline 1/76. Quoted in Jürgen Fuchs, *Magdalena* (Berlin: Rowohlt, 1998), 104.
- 45 For an example, see Michael Beleites, "Die IM-Reihenuntersuchung verkommt zur Farce," *Frankfurter Rundschau*, September 25, 1992, 22.
- 46 Mothes, interview.
- 47 See the speeches reprinted in Gregor Gysi, *Einspruch*, ed. Hanno Harnisch and Hannelore Heider (Berlin: Schwarzkopf & Schwarzkopf, 1992).
- 48 Mothes, interview.
- 49 Michael Beleites, interview by author, Dresden, Germany, January 16, 2004.
- 50 On the historical precedents of the loyalty requirements, see Quint, *Imperfect Union*, 173.
- 51 Federal Labor Court, Decision of October 13, 1994, 2 AZR 201/93. Not all public sector employees are civil servants, and the standards are slightly lower for those who do not have the status of a civil servant.
- 52 See, for example, Der Sächsische Landesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik, *Merkblatt für personalführende Stellen des öffentlichen Dienstes im Freistaat Sachsen* (Dresden, 1994).
- 53 Mothes, interview.
- 54 Federal Labor Court, decision of October 13, 1994, 2 AZR 201/93.
- 55 Federal Labor Court, decision of March 18, 1993, 8 AZR 356/92.
- 56 Ibid.
- 57 Kohler, interview.
- 58 This was one of the most important GDR opposition groups. It was instrumental in the occupation of the Stasi buildings and the general political transition negotiated at the Round Tables. The group was very prominent in 1989/1990.
- 59 Drenckhan, interview.
- 60 Beleites, interview.
- 61 *Niederschrift des Zweiten Koordinierungsgespräches der Vorsitzenden der Ehrenkommissionen des Landes Mecklenburg-Vorpommern*, Schwerin, August 23, 1991.
- 62 Federal Constitutional Court, decision of February 21, 1995, BVerfGE 92, 140, and decision of July 8, 1997, BVerfGE 96, 152.
- 63 Federal Constitutional Court, decision of February 21, 1995, BVerfGE 92, 156.
- 64 Ibid.

- 65 See Norbert Robers, *Joachim Gauck: Die Biographie einer Institution* (Berlin: Henschel, 2000), 183.
- 66 Available at http://www.bstu.bund.de/cln_042/nn_710348/DE/Behoerde/Rechtsgrundlagen/StUG/stug__pdf.html__nnn=true (in German and English; accessed January 24, 2004). The English translation is partially misleading; I am quoting from the German original.
- 67 *Gesetz über die Sicherung und Nutzung der personenbezogenen Daten des ehemaligen Ministeriums für Staatssicherheit/Amtes für Nationale Sicherheit*, August 24, 1990. GDR Official Gazette [Gesetzblatt der DDR] 1:1419–21.
- 68 *Vereinbarung zur Durchführung und Auslegung des Einigungsvertrages* [Agreement on the Implementation and Interpretation of the Unification Treaty], September 20, 1990, Bonn.
- 69 *Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR* [Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic], *Sechster Tätigkeitsbericht* (Berlin, 2003), 21, 71.
- 70 See Edda Ahrberg, ed., *Handreichung für personalführende Stellen des Öffentlichen Dienstes in Sachsen-Anhalt zur Überprüfung von Beschäftigten und Bewerbern auf eine Tätigkeit für das MfS* (Magdeburg: Landesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR des Landes Sachsen-Anhalt, 1995), 72–73.
- 71 Beleites and Mothes, interviews.
- 72 This clause was added in 1996.
- 73 Interview, Dresden, Germany, January 2004.
- 74 Ibid.
- 75 Ibid.
- 76 Statistics from the Greifswald municipal government, 1998.
- 77 Glöckner, interview.
- 78 Drenckhan, interview.
- 79 Ibid.
- 80 Glöckner and Drenckhan, interviews.
- 81 Drenckhan, interview.
- 82 Ibid.
- 83 Information from the city of Greifswald, 1998.
- 84 Glöckner, interview.
- 85 The account is based on information given by members of the city administration in an interview, Dresden, Germany, January 14, 2004, and in response to a questionnaire.
- 86 Drenckhan, interview.
- 87 Herold Busch, *Zeittafel der Universität Greifswald 1986–1990* (archival material) (Greifswald: Universitätsarchiv, 1994), 239.
- 88 Interview by author, Dresden, January 2004.

- 89 *Universitätszeitung* 2, no. 1 (January 10, 1991), 2.
- 90 *Greifswald Commission of Inquiry*, 7. According to the report, which is based on the files found in the Greifswald MfS headquarters in December 1989, the university had 114 unofficial informers, including administrators and students. By June 30, 2003, inquiries to the Stasi files commissioner yielded 143 cases in which university employees had contacts with the Stasi. Not all of these cases are significant, and not all of those who had worked for the Stasi at some point were still active in 1989, when the Greifswald commission drew up the report. There might also be cases in which university employees were informers on events outside the university. The correct number of IMs who were active within the university in 1989 might well be 114.
- 91 Assessment from summer 1989; quoted in *Greifswald Commission of Inquiry*, 7.
- 92 *Greifswald Commission of Inquiry*, 8.
- 93 Alfred Post, *Zur personellen und strukturellen Erneuerung an der TU Dresden nach 1990* (Dresden: Sächsisches Verlagshaus, 2002), 14–16.
- 94 Hans-Jürgen Zobel, “Die Erneuerung der Ernst-Moritz-Arndt-Universität nach der Wende,” in *Tausend Jahre Pommersche Geschichte*, ed. Roderich Schmidt (Köln: Böhlau Verlag, 1999), 475.
- 95 Dahlenburg, interview.
- 96 See *Universitätszeitung Greifswald* 1, no. 7 (April 26, 1990), 4, my emphasis.
- 97 Declaration of the Rector and the Senate, *Universitätszeitung Greifswald* 1, no. 15 (October 25, 1990), 7.
- 98 See Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic, *Sechster Tätigkeitsbericht* (Berlin, 2003), 71.
- 99 Baden, interview.
- 100 For example, interviews with Dahlenburg and Thomas Meyer, Greifswald, Germany, January 2004.
- 101 Dahlenburg, interview.
- 102 Albrecht Reibiger in *Zur personellen und strukturellen Erneuerung an der TU Dresden nach 1990*, ed. Alfred Post (Dresden: Sächsisches Verlagshaus, 2002), 43–44.
- 103 *Universitätszeitung Greifswald* 2, no. 7 (April 4, 1991), 6.
- 104 Letter from the Ministry of Education, dated December 4, 1991.
- 105 Gilbert, interview.
- 106 Reibiger, *Zur personellen*, 45.
- 107 Questionnaire, University of Greifswald, question 29.
- 108 Questionnaire (1994 edition), Saxony Ministry of Education, question 1.
- 109 See Federal Constitutional Court, decision of July 8, 1997, BVerfGE 96, 171.
- 110 Behnke, interview.
- 111 *Verfahrensordnung für die Ehrenkommission der Universität Greifswald*, sections 3 and 4.
- 112 Hans-Ulrich Wöhler, interview by author, Dresden, Germany, January 16, 2004.

- 113 Bernd Pompe, interview by author, Greifswald, Germany, January 8, 2004.
- 114 Dörte Putensen, interview by author, Greifswald, Germany, January 9, 2004.
- 115 Gilbert, interview.
- 116 Ministry of Education statistics, February 3, 1995.
- 117 Thomas Meyer, *Statistische Erfassung und Auswertung der durchgeführten Ehrenverfahren* (September 1992), 5–6 (on file with author).
- 118 See Ehrenkommission Greifswald, *Vorschlag zur Kategorisierung von Fehlverhalten*, July 23, 1991.
- 119 Meyer, interview.
- 120 See Ehrenkommission Greifswald, *Standardbausteine*, no date.
- 121 Gregor Putensen, interview by author, Greifswald, Germany, January 9, 2004.
- 122 Alfred Post in *Zur personellen, und strukturellen Erneuerung an der TU Dresden nach 1990*, ed. Alfred Post (Dresden: Sächsisches Verlagshaus, 2002), 20.
- 123 Dahlenburg and Pompe, interviews.
- 124 Pompe, interview.
- 125 See, for example, Jörn Mothes and Jochen Schmidt, “Die Aufarbeitung der DDR-Vergangenheit,” in *Deutschland Ost — Deutschland West*, http://www.lpb.bwue.de/aktuell/bis/4_00/ostewest03.htm (accessed January 18, 2004).
- 126 *Universitätszeitung* 1, no. 8 (May 10, 1990), 2.
- 127 Beleites, interview.

PART II

Thematic Studies

CHAPTER 10

Gathering and Managing Information in Vetting Processes

Serge Rumin

INTRODUCTION

The International Center for Transitional Justice (ICTJ) defines “vetting”¹ as “processes that involve the examination of employment and other records for the purposes of hiring or firing.”² This definition reveals the key role of information in a vetting process. The objective of this chapter is to provide insight into the main challenges encountered by vetting processes in collecting and processing information. To do so, I will attempt to answer several questions.³ What information is used in vetting processes (section 1)? Is there a link between transitional contexts (post-authoritarian, post-conflict) and the type of information on which vetting procedures are based (section 2)? In what ways does the nature of the information and its processing affect the results of vetting procedures (section 3)? In the third section, I will illustrate the operational challenges to and constraints on information management by looking into the case of police vetting in Bosnia and Herzegovina (post-conflict context), and by reviewing vetting processes in a number of countries in the former socialist bloc in Eastern Europe. Finally, I will explore the possible link between the information used in vetting and other transitional justice measures such as truth commissions and criminal courts (section 4).

This chapter argues that the major information-management challenges in vetting processes are fundamentally different depending on the transitional context: typically, post-conflict efforts have to address a lack of information, while post-authoritarian ones are overwhelmed by secret archives that are not fully relevant to the vetting exercise. The chapter also demonstrates that the operational dimension (means, expertise, tasks, sequencing, etc.) and the implementation stage of vetting processes tend to be underestimated in vetting exercises, and that this substantially impacts the vetting outcomes independently of the context. Finally, regarding information sharing between transitional justice measures, the chapter defends the notion that while there is room for enhanced information interoperability, not all information can be

shared, and what can be shared is primarily conditioned by the existence of an overarching institutional framework.

WHAT INFORMATION IS USED IN A VETTING PROCESS?

Information can be defined as an “element of knowledge that can be coded to be preserved, processed, or communicated.”⁴ The concept of *information* is inseparable from that of *communication*: there could be no information without a source and a destination. Since 1948, when Claude Shannon proposed the foundational theory of information and communication (a linear model: a source of information, a transmitter who transforms the message into a signal, a channel, a receiver who transforms the signal into a message, and a destination), theories have evolved considerably. One of the major developments in these theories has been identifying the intrinsic relationship between the form of the information and its content. Therefore, I will pay particular attention to the form of the information, in an effort to grasp how it affects the very substance of the information in the context of vetting, and beyond that, the process itself.

THE DIFFERENT ISSUES ADDRESSED BY A VETTING PROCESS

Vetting processes address a wide array of issues, which are heterogeneous, generic or specific, sometimes interconnected with one another, and of varying degrees of importance. The following are some examples of these issues (the list is not exhaustive but merely illustrative):

- involvement in war crimes, crimes against humanity, or genocide;
- other gross human rights violations;
- corruption and abuse of authority;
- illegal occupation of refugees’ housing;
- involvement in criminal activity;
- incompetence;
- ties with political groups;
- ties with armed groups;
- activities or ties with police or security services; and
- the value and origin of assets (e.g., war profits).

In addition, during an ongoing vetting process a person’s compliance with the rules of the process itself has also been considered as an issue to be scru-

tinized. In the former socialist-bloc countries studied here, the issues to be addressed were predetermined by laws in a more or less specific manner.

INFORMATION ON WHOM, ON WHAT?

There is, first of all, information on persons whose past actions, and sometimes present actions, are vetted. The category of persons subject to vetting is defined by two criteria:

- the nature of the relationship that the individuals maintain (or wish to maintain) with one or several organizations (in the broad sense of the term) involved in running the country during and after the transition;
- the nature of the relationship that the individuals maintain (or maintained) with one or several organizations implicated in the dynamic of the conflict (post-conflict context) or in the exercise of the fallen regime (post-authoritarian context).

One must note here the case of individuals condemned for common crimes or misdemeanors outside of any organized framework or action that has rendered them morally unfit to perform a function in a state institution. A vetting procedure should prevent these individuals from acceding to or continuing to perform such a function, but this is certainly not unique to vetting. A normal recruitment or promotion process in public administration would logically reach the same result. The first task of vetting, as an ad hoc or transitory mechanism, is to take an interest in the legacy of the conflict or the authoritarian regime. In this chapter, the terms “members of the organization” and “personnel” will be used interchangeably to designate those persons who are the subject of vetting processes.

Next are the facts examined. These concern first and foremost the actions of such personnel in the context of a tie with an organization, and they concern a variety of relevant abuses. Nonetheless, the information as a whole must be placed in a general and historical context that situates actions and offers an overall framework for interpreting them. The following is a basic typology of the five main substantial categories of information needed for vetting.⁵

THE MEMBERS OR PERSONNEL OF THE ORGANIZATION

Here one is interested in the information pertaining to the individuals, i.e., the basic information that makes it possible to identify the individual socially and legally, to become familiar with his or her on-the-job and off-the-job record, and his or her experiences and skills.

*THE ORGANIZATIONS: THE INSTITUTIONS, ORGANIZED GROUPS,
AND OTHER SOCIAL STRUCTURES*

Depending on the context of the vetting, the organizations targeted can be current or past organizations that may have participated directly in the conflict or in the authoritarian exercise of power. These include state institutions (e.g., ministries and their subdivisions, national agencies, etc.), the established corps (police corps, judicial corps, etc.), organizations (local or private police forces, security services, paramilitary groups, political organizations), organized groups (armed bands, local militia, etc.), and social structures (clans, tribes, etc.) that have played an important role during the period targeted by the vetting. This information makes it possible to understand the values, goals, activities, and functioning of these different organizations, which constituted (or still constitute) the framework for the action of the members of interest for vetting.

THE LINK BETWEEN THE MEMBERS AND THEIR ORGANIZATIONS

This is information that makes it possible to understand the role(s) and activities of the members of organizations within those organizations.

THE CONTEXT

Contextual background is general and historical information on how the key events unfolded during the conflict or under the authoritarian regime preceding the transition, which reveals in particular the situation and the roles played by the different actors and organizations. In a post-conflict context, the sequencing of events and the local dynamics are not always well known to all the actors involved in vetting. The conditions in the conflict zones and the fragmentation of territories, rendering some inaccessible to the media or other observers, make it difficult to have an overall and continuous view of the sequence of events. As a result, one will not find a reliable and unique source of a sound and comprehensive overview. One must reconstruct this perspective a posteriori and will find the information by compiling reports or books published by journalists, experts on the area, and even NGOs. Examples include the work of the Independent Human Rights Commission in Afghanistan and the Afghan Justice Project, the reports of the International Crisis Group (ICG) in the Balkans, and the reports of Human Rights Watch in Rwanda.

THE SPECIFIC FACTS EXAMINED

The facts examined are specific and detailed, and may also concern the victims. They are actions attributable to an individual, a group, or an organization.

WHAT ARE THE SOURCES OF INFORMATION USED IN VETTING PROCEDURES?

The sources of information are well known; therefore, we will limit ourselves to listing and briefly describing them. However, it must be noted that the source of information affects how solidly that information is supported, its structure, its forcefulness, and the legitimacy of its content.

INTERNATIONAL INSTITUTIONS

The management of democratic transitions in post-authoritarian contexts remains within the national domain. In contrast, in post-conflict situations the international community is often extensively involved in managing the transition, and, as a result, produces information.⁶

NATIONAL INSTITUTIONS

State institutions provide information about the organizations themselves, such as their values, goals, activities, and operations, but also about the persons they employed (or presently employ), as well as the positions these employees have occupied or still occupy. A United Nations Educational, Scientific and Cultural Organization (UNESCO) report⁷ proposes an interesting classification of “repressive institutions,” as follows:

- institutions created as an instrument of repression: intelligence and secret services, paramilitary groups, special tribunals, concentration camps, special prisons, and psychiatric reeducation centers; and
- repressive structures within the conventional administrations that exist after the transition: armed forces, police forces, security services, civilian courts, and other organs of the civilian administration.

The information provided by these repressive institutions may in turn be classified into several subcategories:⁸ complaints, reports of tortures, inquiries, and so on.

CIVIL SOCIETY

Civil society sources of information include: local and international non-governmental organizations (NGOs), independent research centers, and so forth;⁹ independent media, both national and international; individual testimony (the victims themselves being the most important source); and the members of organizations subject to vetting (as required by the authorities in charge of vetting, or by their own leaders, they provide specific and substantial information¹⁰). However, in the countries of the post-communist bloc, the boundary between offender and victim is not always clear.¹¹

THE LINK BETWEEN INFORMATION USED IN VETTING AND THE TRANSITIONAL CONTEXT

POST-CONFLICT TRANSITIONS

Here I will look at several post-conflict countries, even though not all of them have implemented a vetting process. In Rwanda,¹² Bosnia and Herzegovina, East Timor, and the province of Kosovo,¹³ varying degrees of vetting occurred. In other countries, evaluations have been conducted with a view to putting in place a vetting process: Haiti, Liberia, Democratic Republic of the Congo (DRC), and Afghanistan.¹⁴ These evaluations are relevant to the extent that the results support the analysis of post-conflict contexts and confirm trends and characteristics identified in the countries that underwent vetting.

Conflicts often bring about the destruction of countries' infrastructure and institutions. Archives are no exception. Peace accords, in such cases, call for structural reform or reestablishment of institutions (e.g., Bosnia and Herzegovina, Liberia, Afghanistan, DRC, and Kosovo). The individuals who make up the personnel of new or much-altered institutions may be almost entirely different (Kosovo, East Timor, and Rwanda), or different in part (Bosnia and Herzegovina, DRC, Liberia, Afghanistan). The institutional memory of human resources is therefore either very limited (Bosnia and Herzegovina, DRC, Liberia) or nonexistent (Rwanda, East Timor, Kosovo). When archives do remain, they have been partially destroyed and no longer accurately reflect reality (Afghanistan, Liberia, DRC, Bosnia and Herzegovina, Haiti). The contracting of personnel, dismissals, and appointments, both during the conflict period and at the beginning of the transition, is often done in whole or in part outside of any formal process. The result is a very loose sense of the numbers and nature of institutions' personnel.

Vetting efforts in post-conflict countries therefore cannot be based on existing institutional information, or can be based on it only to a very limited extent. Instead, the necessary data must be specifically produced to inform the vetting process. The major sources of information in these cases are the individual questionnaires and the specific surveys mandated by the vetting authorities (Bosnia and Herzegovina, Kosovo, Rwanda¹⁵). The information contained in reports by NGOs, testimony from members of civil society, as well as new articles and press reports have sometimes proved to be very useful (Bosnia and Herzegovina, Kosovo¹⁶), at least to orient the research of the vetting authorities.¹⁷

THE POST-TOTALITARIAN TRANSITIONS IN EASTERN EUROPE

It seems that all dictatorial regimes systematically generate, in different proportions, files on individuals.¹⁸ Nonetheless, it is useful to distinguish the post-totalitarian transitions of the communist/socialist bloc, which share structurally homogenous legacies that lead to similar outcomes, from the transitions from other dictatorial regimes. Post-authoritarian regimes such as Greece, South Africa, and Argentina do not represent a coherent category, properly speaking, and in none of these countries was vetting very significant, nor did it rely on the archives of the security services. It would be venture-some in these cases to try to tie the nature of the context to the structure of the information used in vetting. Therefore, we will focus on the post-totalitarian transitions in Eastern Europe.¹⁹

THE ARCHIVES OF TOTALITARIAN RULE

The merger of the three branches of government (executive, legislature, and judiciary) and a single party that exercises a monopoly over ideological propaganda, police control, and repression are structural characteristics of totalitarian regimes identified in the well-known analysis of totalitarianism by Hannah Arendt.²⁰ Each communist-bloc regime sought to subject individuals to a collective order, relying on an immense institutional network aimed at informing the state and Communist Party elite of the smallest movements of citizens, and allowing for the mobilization of a major repressive apparatus that, using a variety of more or less violent techniques, brought pressure to bear on individuals judged to be subversives. This elevation of the surveillance function to the institutional level resulted in voluminous archives, such as those of the Stasi in East Germany.²¹

The democratic transitions in the Eastern European bloc, with the exception of Romania, resulted from negotiation without major violence or destruction, which ensured relative stability and continuity. While most state institutions never stopped operating and their files were not destroyed, most of the security and intelligence services were quickly dissolved.²² However, in all ten countries²³ of the former communist bloc in democratic transition considered in this study, institutional measures were taken²⁴ to preserve the archives of the security services.²⁵ Four of them²⁶ adopted specific laws on archives (on access or conservation); another five countries²⁷ created spaces dedicated to storing their archives.

The archives have become an object of political struggle, and individual files are part of political life:²⁸ in Poland,²⁹ there is a veritable war of personnel files,³⁰

which often become tools of blackmail; in Estonia, Latvia, and Lithuania,³¹ former KGB agents engage in manipulation; in Romania, efforts are made to discredit political adversaries because of their collaboration with the old regime; in the Czech Republic,³² manipulation of files has continued since 1989.

In the communist-bloc countries, vetting is labeled lustration³³ and is structured around the information contained in the archives of the security services. These services' files have become the quasi-exclusive source³⁴ of the different vetting procedures. It is legitimate, therefore, to ask why these sources of information have monopolized the vetting resources and mechanisms.

THE SYMBOLIC DIMENSION OF TOTALITARIAN GOVERNMENTS' ARCHIVES

Although they are not reliable or complete sources, the archives of the repressive institutions are fascinating³⁵ and very charged emotionally. Of the ten countries of the communist bloc considered here, four have decided to keep their archives in a national institution devoted to preserving historical memory. This mass of files represents much more than the sum of the information it contains. The files have symbolic force; they represent a part of citizens' lives, a part that has escaped them and that they want to recover. One can hear people clamoring, "I want to have my say,"³⁶ or even, "I want my file."³⁷ In the impassioned debates around victims' access to their own files, the key questions are: Should all the files be destroyed? Should they all be made public? Or should each individual be able to decide the fate of his or her own file? If the files are made public, won't it contribute to dividing society?³⁸

At the societal level, the totalitarian nature of the former regimes engendered varying degrees of widespread suspicion, an alteration of social relations, which are constantly soaked with a diffuse terror,³⁹ and a fear of being observed in one's most minimal acts and gestures. "They had to terrorize the population in order to ensure the stability of the regime."⁴⁰ Romanians, for example, were persuaded that one citizen in four was an informant.⁴¹ Michel Foucault, who analyzes the "microphysics of power," offers a good description of the phenomenon: "The modality [of control]: it implies an uninterrupted, constant coercion, supervising the processes of the activity rather than its result; exercised according to a codification that partitions time, space, movement as closely as possible."⁴² These files represent power as exercised by control of every moment, and felt by everyone. Taking control of these files, and making a choice as to their fate, therefore, likely represents a reversal of the situation and accordingly a symbolic inversion of power. (In the case of East Germany, it is possible that the importance the Stasi files came to have and

the role the population played in preserving them are also linked to the key place of the Nazi files in the Nuremberg trials.⁴³)

One must underscore a paradox.⁴⁴ The files are the product of repressive institutions that operated on the margins, or at times in the shadows, of the law. The actions of the officials and their collaborators included modi operandi such as blackmail, psychological or physical pressure, lying, and so on. The reality of the facts described in the files cannot be separated from the context in which they were created. However, in all these countries these files were treated by the new regimes as the source from which the truth would spring forth.

THE PHYSICAL DIMENSION OF THE ARCHIVES

The volume of the information stored in the archives of totalitarian regimes is, in some cases, huge. The Stasi in East Germany presents a spectacular case: its archives took up 180 km of shelf space and held six million individual files.⁴⁵ The Securitate of Romania had 18 km of archives.⁴⁶ It appears, however, that none of the countries considered here was able to preserve all of the archives. Although the security services were dissolved, they did not disappear all of a sudden.⁴⁷ The personnel in charge of these institutions had the time to destroy certain files. In Hungary, for example, “for more than 10 years they [the elites of the transition] were able to exclude any civilian control and to be the ones to decide what should be deposited in the archives.”⁴⁸ In East Germany, in a unique case, a citizen movement laid siege to and took over the offices of the Stasi on January 15, 1990, and it was under the pressure of street protests that the law on files was adopted in 1991. This citizen mobilization, however, could not stop the destruction of numerous files.⁴⁹ In the three Baltic countries of the former USSR (Estonia, Latvia, and Lithuania), the KGB had time to screen and then pull the most sensitive files, to destroy or falsify a great many others,⁵⁰ and to repatriate a large part of its archives, especially those on Latvians and Lithuanians,⁵¹ to Moscow. In Lithuania, which has the largest set of documents of these three countries, certain dissidents saw this as a victory for communism, and beyond that, for Moscow, whose agents would in fact never be unmasked.⁵² According to Jozsef Vegvary, a lieutenant colonel in Hungary’s political police,⁵³ of 110,000 files on recruitment, 100,000 were destroyed. In Poland, in 1990 and 1991, the employees of the Ministry of Interior carried out the massive destruction of confidential documents.⁵⁴

While it is known that not all of the files were preserved, what about the integrity of those that were? The politicization and manipulation of certain files, and the fact that they were not completely and immediately removed

from the influence⁵⁵ of the officials in charge of them,⁵⁶ leads one to presume that the practice of falsifying or deliberately altering certain files was systematic, as was clearly the case in Poland.⁵⁷ It must also be noted that limited resources during the transitions in Hungary⁵⁸ and the Czech Republic⁵⁹ forced the authorities in charge of vetting to retain the archives' technical staff from the former regime, who could easily corrupt the files. Just how widespread this phenomenon was is impossible to assess.

How did a state apparatus collect, process, and act on the basis of such a large mass of information? In all these countries, organizing the collection of information during the authoritarian period relied on networks of informants recruited from among the population using a variety of techniques:⁶⁰ "The StB knew of numerous techniques for breaking down individuals."⁶¹ In Poland, "recovery" of information entailed psychological manipulations that led informants to believe that they were providing information at their own initiative.⁶² In Germany, the Stasi used several approaches, including blackmail.⁶³ The mass of informants, numbering at least one hundred fifty thousand, plus about ninety thousand public servants at their posts,⁶⁴ helps to explain the magnitude of the volume of information. The lists of collaborators or of officials with links to the fallen power structure that circulate in several countries illustrate this phenomenon. In the Czech Republic, the Ministry of Interior published a list of seventy-five thousand names;⁶⁵ and a dissident, Petr Cibulka, published another list with twenty thousand names of StB agents. In Poland, a journalist published his list, the "Wildstein list,"⁶⁶ with two hundred forty thousand names. In Romania, there is talk of one million collaborators (out of a population of twenty-two million) who were directly involved in the institutional structures of the communist regime; in several ministries more than 90% of the civil servants were informants.⁶⁷

Likewise, to complete the enormity of this picture, mention should be made of the large number of victims of the system, who underlie the figures cited above, and whose names fill the pages of the files. In 2003,⁶⁸ it was reported in Germany that two million people who felt they were spied on had demanded access to their files.

When these archives were being created, the new information technologies (ITs) had not yet been developed. Recording information entailed simple techniques, and the specific files were on paper. This is a key factor when it comes to processing the files for purposes such as vetting. In addition, these files are technical documents using codes, a reflection of the culture of secrecy as well as a constraint of management and access. They were designed not to

be accessible and intelligible to most people,⁶⁹ but to allow an effective, almost automatic, control of citizens.

From the beginning of these transitions, the volume, medium, structure, number, and variety of sources raised questions concerning the coherence and substantive relevance of the information that one could expect to extract from the archives.

THE OTHER SOURCES OF INFORMATION FOR LUSTRATION

When the bloc fell, large-scale archives other than those of the secret services and security agencies existed,⁷⁰ particularly those of the Communist Party.⁷¹ To the extent that the party apparatus was hard to distinguish from the state apparatus, it is only logical to think that the party's archives certainly contained substantial information relevant to the lustration process. However, those archives were not considered in the same light. For example, in Poland, while the files of the security agencies suffered damage, those of the Communist Party were not targeted. In East Germany, the files of the Socialist Unity Party (SED)⁷² were partially consulted in the context of local vetting procedures, as with the municipal administration in the city of Dresden.⁷³ Yet they were excluded from the jurisdiction of the vetting mechanism put in place at the federal level. This is a by-product of having a transition without a clear break. When the secret services and security services were dissolved, the question of the status of their files was posed at the institutional level. The communist parties, however, continued their legal and political existence, and their archives naturally remained their own responsibility.

The lustration processes used other sources as well. In most countries, personnel filled out questionnaires or declarations. Of the ten countries considered here, Hungary appears to be the one with the widest diversity of sources:⁷⁴ there were hearings with members of organizations, testimony from victims, expert opinions, lists of personnel and payrolls, as well as lists of names that circulated on the Internet.⁷⁵ The Czech Republic and Poland also saw lists of names published by civil society groups on the Internet.

Another variable to be taken into account in vetting relates to the passage of time. East Germany is the most noteworthy case in which the duration of vetting has given rise to conflicting views on the expectations of the process.⁷⁶ The passing of time (the "Gauck" Office was still fully active in 2006, twelve years after it began its work) has enabled some of the persons in question to build a new professional record in reformed institutions during the transition. This record, which is included in the personnel management files,

provides further input for the process. There are numerous cases of persons who have now been identified, more than ten years after the fall of the Berlin wall, as having maintained ties or worked with the security services of the communist era, which, theoretically, rendered them unacceptable for the new duties they are now performing. Nonetheless, their professional record since then has been seen to offset that during the communist period. On the other hand, those persons who directly admitted having had ties with the security service from the outset lost their jobs quickly and permanently.⁷⁷ Their honesty was not compensated, but instead it took away their opportunity to redeem themselves.

The documents consulted for this study do not make specific reference⁷⁸ to archives such as lists of personnel, payrolls, or banking transactions, that is, to the administrative and accounting records that reflect an institution's management. These sources are, however, very relevant to the vetting process: they inform us of the functioning of the institutions, and the nature of the ties that individuals maintained (or maintain) with them.⁷⁹

COLLECTING AND PROCESSING INFORMATION IN A VETTING PROCESS

COLLECTING AND PROCESSING INFORMATION IN POST-CONFLICT CONTEXTS

WHO DEFINES THE SOURCES, WHO COLLECTS, WHO PROCESSES, WHO DECIDES?

In the absence of available information, a vetting process must itself generate the necessary information. In such situations there is a fundamental difference from the lustration processes undertaken in Eastern Europe, where the information already existed. In post-conflict situations uncertainty prevails, and the production of information represents an effort to produce certainty. In addition, the actors in charge of processing the information needed for vetting enjoy the "power of the expert." An actor increases his or her power by mastering areas clouded by uncertainties.⁸⁰ The absence of a specific legal framework for vetting reinforces this power. The actors in charge, beyond the processing of information and decision making, are also responsible for defining the sources, form, and substance of the information that will be the basis for the vetting process. The table below shows some examples. One can note the more or less significant involvement of the international community.⁸¹

TABLE 1

Actors' involvement in collecting and processing information

COUNTRY/ TERRITORY	CHOICE OF SOURCES AND COLLECTION	PROCESSING	DECISION MAKING
<i>Bosnia and Herzegovina</i>			
Police	UNMIBH	UNMIBH	UNMIBH
Judge	OHR (with domestic involvement)	OHR (with domestic involvement)	OHR (with domestic involvement)
<i>Kosovo</i>			
Creation of a new police force (KPS)	UNMIK	UNMIK	UNMIK
<i>Liberia</i>			
Implementing an interim police force	National Police	UNMIL	UNMIL
Final police project*	National Police/UNMIL	National Police/UNMIL	mixed commission
<i>Haiti*</i>			
Reform of the police (PNH)	PNH/MINUSTAH	PNH/MINUSTAH	PNH/MINUSTAH
<i>Afghanistan*</i>			
Appointment of high-level officials in the provinces	Mixed/independent group (national and international). Varied sources.	Mixed/independent group (national and international)	President
<i>DRC*</i>			
Reform of the national police	Congolese National Police/MONUC	Congolese National Police	Congolese National Police

* Projects not implemented to date

The role of the international community, which has been in charge of the processes in Bosnia and Herzegovina (see below) and Kosovo, introduces a linguistic and cultural barrier that has a significant impact on how the process unfolds and on its substance. This barrier gives rise to errors (in interpretation and in the proliferation of tasks), weakens the guarantee of independence sought by international involvement (the neutrality of local translators/interpreters), and brings about a consequent increase in activity and in the need for resources.

HOW IS INFORMATION COLLECTED AND PROCESSED?

The collection and processing of information in vetting should begin with a clear understanding of objectives, of the information to be obtained in order to reach these objectives, of the volume of information to be processed, of the type of processing required, and of the available resources. This allows the design of a realistic operational plan. However, the general post-conflict context and dynamic imposes its own logic on such a process for a number of reasons, including the following:

- The sudden collapse of the formal mechanisms for managing institutions does not allow for a precise view of the breadth of the challenge. Estimates of the number and nature of personnel are very approximate, very controversial, or even deliberately falsified. All of this makes it difficult to draw up a coherent operational plan.
- The high expectations of victims and citizens, and the international community's tendency to push towards an exhaustive approach to vetting, have a direct impact on the volume of information to be collected and processed.
- Victims, the international community, and much-sought-after donors may, at the same time, apply considerable pressure for a quick transition and reconstruction.
- The human and financial resources required to rebuild a country that has just emerged from a conflict are always colossal, and available resources always fall short of these needs. The vetting process cannot escape this constraint. (This is in sharp contrast to the abundant resources available to the Gauck Office in Germany; see the section below on processing information.)

In the following subsection I will try to illustrate the operational constraints on and the level of complexity inherent in information management in a post-conflict context⁸² through a detailed examination of the police certification program in Bosnia and Herzegovina.⁸³

INFORMATION MANAGEMENT IN THE VETTING OF THE POLICE IN BOSNIA AND HERZEGOVINA

The certification program was started, designed, and managed within the human rights office of UNMIBH.⁸⁴ The program, the need for which became apparent in early 1999, employed fifty people (one project manager, one international lawyer, twenty-eight international police officers who were also called "monitors," and twenty national staff members, including secretaries,

lawyers, and interpreters). Before anything else, the idea was to take stock of all the police personnel inherited from the conflict upon the signing of the Dayton Accords in December 1995. It was necessary to know and understand who was exercising police powers: How many were they? Where were they? When and how did they join the police? What did they do? What had they done during the conflict? Could they continue to perform their functions? These considerations thus defined a general starting point. Once a starting point is clarified, a vetting process can decide, on the basis of established criteria, who can and who cannot exercise police powers within the reformed police in a state newly reestablished under the rule of law.

The program in Bosnia and Herzegovina was divided into three major stages:⁸⁵

- registration, the goal of which was to take stock of all the personnel in the various police forces;
- provisional authorization to exercise police powers, the goal of which was to make an initial selection relying on basic criteria, reduce the total number, clarify who was and who was not authorized to exercise police powers provisionally, and distribute a provisional identification card; and
- certification, the goal of which was to expand the vetting criteria, especially into issues of integrity, and to extend definitive certifications to the members of the police forces.

Here I will focus on the first two stages, which lasted approximately two years, in order to illustrate certain phenomena. Little information is available on the third stage, certification.

Registration, which began in October 1999, required the use of questionnaires that each member of the personnel had to fill out. Handling these questionnaires, which were filled out by approximately twenty-four thousand persons (the number was unknown at the outset), can be identified as an administrative task. In the absence of a specific legal framework, decisions concerning data to be collected and the questions to be asked had to be made by those in charge of the registration program. In the midst of post-conflict restructuring, the political-judicial apparatus was impaired in its capacity to produce specific laws and procedures. The legal framework of vetting was limited to the peace accords, UNMIBH's mandate,⁸⁶ and subsequent resolutions of the UN Security Council. The vetting mechanics were therefore defined through practice; they were the result of compromises between the operational constraints and the reality on the ground, minimum imperatives

regarding the criteria for competence and integrity of the police personnel, and the desired reduction in the maximum number of police. These were then specified and formalized according to official UNMIBH procedures.⁸⁷

Registration was done one police force at a time (there were fourteen, then fifteen including the Border Police⁸⁸). The police personnel filled out the questionnaires in situ, at their headquarters, under the supervision of an UNMIBH team. These questionnaires were then examined at the UNMIBH headquarters in Sarajevo in order to verify whether the criteria were met. If so, an identity card was issued. The Ministry of Interior received the list of persons who had been authorized to exercise police powers provisionally with the respective identity cards, so as to distribute them. The list also mentioned all the persons who had not been authorized, stating the reasons for those decisions. The ministry had a right to respond, and supplementary exchanges of information ensued.

The criteria for obtaining provisional authorization to exercise police powers were as follows:⁸⁹

Positive criteria (allowing one to be eligible for a provisional authorization):

- minimum age eighteen years;
- being a national of Bosnia and Herzegovina;
- appearing in the list of personnel provided by the caretaker Ministry of Interior;
- passing the UNMIBH knowledge tests and psychological tests;
- exercising police powers (as opposed to administrative tasks);
- complying with UNMIBH registration procedures.

Negative criteria (prohibiting provisional authorization to exercise police powers):

- being publicly investigated by the International Criminal Tribunal for the former Yugoslavia (ICTY);
- having a police record with other than minor offenses;
- having been previously removed by the International Police Task Force (IPTF) Commissioner (the police component of UNMIBH);
- making a false statement;
- being subject to criminal prosecution by a local court for a serious crime or war crime;
- appearing on the list of the Anti-Terrorist Police Brigades and not having been approved by UNMIBH's special selection procedure.

Additional criterion:

- not illegally occupying housing with respect to which there is a judicial decision benefiting the owner so that he or she may once again enjoy his or her property.

Vetting included a verification stage using the following sources of information:

- individual performance reports (source: UNMIBH);
- reports or investigations of the Human Rights Office (source: UNMIBH);
- reports or investigations of the Civil Affairs Office (source: UNMIBH);
- situation reports of the IPTF monitors on the ground (the “SitReps”);
- reports by NGOs (e.g., International Crisis Group);
- list of candidates in the elections (source: Organization for Security and Cooperation in Europe [OSCE]);
- information from the office of the prosecutor of the ICTY;
- reports from the SFOR;⁹⁰
- list of the judicial decisions on illegally occupied housing (source: CRPC⁹¹);
- list of the Police Anti-Terrorist Brigades (source: SFOR);⁹²
- judgments of the regular courts;
- arrest warrants (domestic courts);
- reports of internal disciplinary procedures of each police force.

The questionnaire used for vetting the police required specific information on:

- civil status;
- activities and places of residence in wartime;
- education;
- military experience;
- professional experience in the police and level of training;
- possession of real property and economic activity.

One then had to give the names of at least three persons (with their contact information) who could attest to the truth of the information. Follow-up on these references was very rare, occurring only in a few specific investigations. The form ended with a statement certifying the veracity of the information provided by the respondent.⁹³ Clearly, controlling the design of the

questionnaire was much more than a mere technical exercise, as it shaped the whole procedure.

But the question of power at the operational level also was posed from the outset of the information-collection process. The boundary between who was eligible to fill out the form (meaning, then, who was eligible to be registered) and who was not was often blurred. The UNMIBH monitors charged with registration and sent into the field to have the forms filled out inevitably came across peculiar cases. Some examples included: persons in uniform supported by their superior, who claimed to be police but were not on the list drawn up by the caretaker Ministry of Interior; persons absent or said to be sick and whom the monitors had to search for; or persons having suffered war wounds (e.g., two persons whose legs had been amputated) who were confined to their homes and who the police chief claimed still exercised police powers. If the form was not filled out, the person was to be excluded from the process.

In practice, however, in order to avoid making the monitors into decision makers on the ground, to reduce pressure, and to ensure uniform treatment, all persons who came forward were registered, including the peculiar cases; any decision was deferred until subsequent processing of the information. This approach, dictated by operational constraints, had certain implications. In effect, the “review” logic of the certification program⁹⁴ meant that one would be deprived of the possibility of exercising police powers if the criteria were not met. All those who registered were *de facto* likely to obtain a provisional authorization to exercise police powers, and later to be certified; in other words, one who registered was accepted in the police *a priori*, and would only be excluded if he or she did not meet the criteria *a posteriori*.

An example illustrates the importance of how the information is organized. UNMIBH, which has a mandate to oversee, advise, and train the local police, and to assist them in the reform process, was deployed after the signing of the Dayton Accords.⁹⁵ The international police, under the IPTF component, with an initial authorized force of 1,721 and then of 2,027, were present in seven regions. These territorial divisions are a legacy of the division used by the preceding United Nations mission, United Nations Protection Force (UNPROFOR). Each region has a general headquarters, which supervises the activity of, on average, seven to eight IPTF stations in its area of responsibility. In total there were fifty-four IPTF stations distributed throughout the country. Each day, the IPTF monitors report on the situation of the local police to their station commander. The station commander then prepares a situation report (SitRep) for the regional commander, who in turn submits a situation report

on the whole region to the central office for operations in Sarajevo.

When the certification process was initiated in 1999, this set of IPTF reports appeared to be a clear and promising source of information for examining the conduct of certain members of the police. The files contained about seven thousand reports. However, the type of data they contained made it impossible to use this source. In effect, the territorial organization of the IPTF did not correspond to that of the local police.⁹⁶ The name of the local police station where events unfolded, therefore, did not appear in the report. What appeared instead was the name of the IPTF station issuing the report, and the name of its IPTF region. In certain cases a single IPTF station covered a territory that crossed the dividing lines separating the entities.⁹⁷ As a result, three years of work of hundreds of monitors on the ground were of no use. The type of data stored in the SitReps was changed in early 2000 to make the data useful for vetting.

To cite another example, the names of the local police officers in the SitReps were not supplemented by their dates of birth, and sometimes only the surname was included. For example, of 23,902 names registered,⁹⁸ 149 persons had the surname Kovačević (five of whom had the given name Slobodan), 146 had the surname Hodžić (four of whom had the given name Amir and another four Emir), and 87 had the surname Savić (eight of whom had the given name Dragan). Furthermore, the reports were drafted in English by international police who had not learned the local language, not to mention the obstacle posed by the Cyrillic alphabet (except for the Russian-speaking monitors). This language barrier thus introduced an element of confusion in the spelling of names.⁹⁹ Several reports described acts relevant to vetting but did not make it possible to attribute these to a particular individual with certainty. Therefore, they were not taken into account.

The language issue in Bosnia is highly sensitive and very political. Each ethnic community asserts its own language: Bosniak, Croatian, or Serbian. Although there is no doubt that everyone understands one another perfectly well, the registration form had to be printed in the three languages. In addition, three types of forms had to be prepared, which introduced a risk: setting off to register in a Muslim zone with forms in the Cyrillic alphabet would have provoked major tensions. In fact, the registration was done with forms in four languages, as English was necessary for processing by international teams. As a result, with each question being written four times, the forms became less readable and information much more difficult to process.

The following example illustrates the impact of organization and resources on how the data were processed. The complete process of registering one

person (here we are looking at the registration process, not vetting *per se*, which came later), took about two hours. Monitors had to explain the procedures, check names against a list of personnel, have the questionnaire filled out, take photographs and fingerprints, measure height, and administer two written tests (one psychological, the other on knowledge). A well-organized team of seven or eight persons could share the tasks and register three hundred persons per day. Carrying out a registration session at the local police posts included a preliminary visit to check the adequacy of the facilities, planning the logistics, the registration itself, and a second round of registration for personnel who were absent the first time (those who were sick, on leave, or on special duty, etc.). With all these activities, it was not possible to register more than about two thousand persons per month.

An organizational issue arose as to whether several teams should work simultaneously across the country; for example, one per region. Different teams, however, would inevitably handle particular cases in different ways, undermining the consistency of the process. Moreover, given the large number of persons with the same name, a unique number had to be assigned as an identifier for each person registered. Sequential numbers are excellent identifiers, as they are simple and unique, and make it possible to impose several controls on the processing to avoid mistakes.¹⁰⁰ If seven teams had been sent out (one in each region) at the same time, however, generating sequential numbers simultaneously at seven different sites would have required the implementation of an organizational structure too complex to manage without error in the UNMIBH context. The necessary technology, though relatively simple, could not realistically be considered for use in the organization. To complicate matters further, there was very high turnover of the international police working in the teams.¹⁰¹ In the end, therefore, it was decided that a single team would register one region at a time, resulting in a much longer process, with its advantages and drawbacks.

As time passed, the institutional environment changed, and this had a significant impact on how the program unfolded. For example, it was necessary to manage, at the same time, the implementation of a new police force and the Border Police—which drew its members from the existing forces—each of which was at a different stage of the certification program. Furthermore, the conflict's legacy included hundreds of thousands of displaced persons' and refugees' houses that were illegally occupied, many by police officers. The passage of time brought increased pressure on local police to deal with the illegal occupation of housing. While not an issue initially, the progressive normalization of the issue of such illegally-occupied housing throughout the

country forced UNMIBH to introduce a new vetting criterion at midstream in the procedure. It became necessary to go back to thousands of police already registered to request supplemental information on their housing situation, to evaluate its legality, and to condition the issuance of their identity card on regularization of their situation. In all, 8,300 cases of occupied housing were detected, 7,998 being illegal occupations. Those police either evacuated the housing they had occupied illegally (80%) or entered into legal contracts with the owners. Only three persons preferred to lose their positions in the police.¹⁰² A deadline of one month was set (easily extendable to two months) to come into conformity with this new criterion.

Information storage also had to be addressed. At the end of the certification program, which coincided with the end of UNMIBH's mandate on December 31, 2002, all of the records of the certification program (the "Registry"), which was the property of the United Nations, were shipped to the United States. The records are no longer accessible to the local authorities. This extreme situation, which is directly tied to the fact that the program was the responsibility of the international community, resulted from a shortcoming in the legal framework. The status of the certification program under domestic law has never been addressed. A legal imbroglio ensued over decisions contested by certain members of the police, which were brought before the courts, and for which the relevant information is not available.

The start-up of the vetting process in Bosnia and Herzegovina was a turning point for the country's police force and for the UNMIBH operation. "Knowing" made it possible to finally take specific and systematic actions. The program made it possible to address certain areas of uncertainty, and gave structure to the mission's activities (determining the total number of personnel, recruiting minorities, strengthening supervision of the police, etc.). It bolstered the overall strength of the mission.

Operationally, however, the initial standards for management and control of information could not be maintained throughout the duration of the entire program for two main reasons:

- the process became more complex as it unfolded: verifying the standard criteria for registration (phase 1) and for the provisional authorization (phase 2) was simpler than evaluating the personnel files for integrity (phase 3). However, the team in charge was subjected to significant pressure due to the expiration of the mission's mandate as set by the Security Council. At least six more months were needed to conclude the program satisfactorily;

- in the final months, the local personnel and international police experienced a difficult time with uncertainties over the reclassification of personnel in the future mission of the European Union (EUPM), which was to succeed UNMIBH in January 2003 (reduction of forces to one-third or one-fourth the previous number). Some personnel were more concerned with securing their future situation than carrying out day-to-day activities.

KEY LESSONS TO BE LEARNED

FROM THE BOSNIA AND HERZEGOVINA EXAMPLE

The case of Bosnia and Herzegovina examined here provides us with a number of important lessons learned about the management of information in post-conflict vetting processes. These include the following:

- The vetting process is a decision-making process, in which decisions are made about confronting the collected information with defined criteria. A lack of clarity in the objectives of the process at a policy level will result in deflecting part of the decision-making power to the operational level (in the performance of tasks such as designing questionnaires, collecting information, etc.).
- The type of information collected and the way it is organized directly affect the nature of the outcomes of the vetting process.
- The means (including technology) used to collect and process information, the way they are allocated, and the way they are organized to serve the vetting process also have a substantial impact on the vetting results.
- Immediate post-conflict contexts may be subject to rapid institutional changes. The capacity to collect and process information is a critical factor for the duration of the vetting process—the longer the process, the more its implementation may be subject to substantial changes affecting the consistency of the outcomes.
- International leadership and overall control of the entire vetting process, often seen as a guarantee of independence and integrity, may, however, induce perverse effects due to cultural and language barriers, which, in turn, may undermine the reliability of the process.
- One concrete legacy of a vetting process is an archive representing both an institutional memory that is subject to scrutiny and a living collection of data that belongs to the institution's personnel management system. The future usability of this output requires vision and policy decision making.

PROCESSING INFORMATION IN THE POST-AUTHORITARIAN CONTEXT OF THE COMMUNIST-BLOC COUNTRIES

In contrast to post-conflict cases, in the post-authoritarian transitions of the communist bloc the information necessary for vetting already exists and the mechanisms for making use of it are entirely the responsibility of the national authorities, which are either bodies created from scratch or ad hoc mechanisms within existing institutions. These countries have adopted a wide variety of approaches to setting up lustration mechanisms, succinct descriptions of which are provided in the appendix to this chapter.

The documents consulted for this study generally offer little in the way of details on the actual processing of information. In terms of the substance of the information, one notes difficulties in terms of how a vetting process interprets the information found in the files. The information is highly variable in its content; following are a few examples:

- In the most typical situation, the information is only partial.¹⁰³
- Suspicions of falsified data and the pressures brought to bear on informants tend to undermine the validity of the information and make it difficult to interpret the connection between the individual and the institution. Accordingly, it is difficult to determine whether one is a victim or an informant.
- Certain individuals appear as both victims and informants.¹⁰⁴ The processing of the information and the rules of procedure induce a perverse effect: the fact of being marked as an informant prevails over the fact of appearing as a victim, while being an informant may be the consequence of being a victim.
- It could be that a “candidate” (for informant) was not successfully recruited, yet he or she is still mentioned in a file.¹⁰⁵
- The nature of the ties described between an informant and an institution is highly variable, and the definition of such a relationship thus becomes very hazy.¹⁰⁶ The legal provisions are not so specific as to allow one to take a clear position. For example, one may have been an informant, been a secret agent, made an apartment available for interviews, agreed to recount one’s vacation experiences upon returning from abroad (in exchange for a visa), or been an accomplice in a campaign aimed at discrediting a colleague, among others.
- In addition to considering existing information, one must consider the absence of information. It appears that all the information on informants was not in the files. In other words, in practice certain information was not written down.¹⁰⁷

- Several documents in the files are not signed¹⁰⁸ or stamped, making it difficult to assess their validity.¹⁰⁹
- Certain agents of the security services had an interest in entering in the files the names of persons who were not informants. In effect, agents' evaluations or salaries depended on, among other things, their capacity to recruit informants.¹¹⁰ An individual's name may have been put on a list before he or she had even been contacted, in order to "reserve" that person before another colleague approached him or her.¹¹¹

The data within the files as well as the files within the archives are organized to serve the goals of the institution that created them.¹¹² In architecture, the function of a building conditions its design; the same holds for an information system. There is a structural limit on the use of those archives for different purposes. Of course, as in the example of a building, certain archives lend themselves more easily than others to difference uses.

There is also a major difficulty linked to the volume of files to be processed. The Gauck Office in Germany is certainly the vetting body that has received the most abundant resources; in 2003 (twelve years after it was opened), this office still employed 2,397 persons.¹¹³ Indeed, they were needed to process, from the 180 km of records, the two million requests for access to the files made during this period. The challenge regarding the volume to be processed has been compounded by the great decentralization and fragmentation of offices in charge of vetting,¹¹⁴ making control of the process all the more complex.¹¹⁵ In Hungary, the procedure is both time consuming and costly to the administration.¹¹⁶ In Poland,¹¹⁷ the transfer of the files to the archives of the Institute of National Remembrance has been very slow, and the resources allocated to the institute do not allow for the sound management of these archives. As for Romania, one can imagine, beyond the political obstacles accompanying the return of the communists to power, the challenge awaiting the managers of the 18 km of archives.¹¹⁸ It is acknowledged in the community of archivists that the processing of a large number of requests may lead to the collapse of the activities of traditional archive-management systems, which as a general rule are chronically understaffed.¹¹⁹

There are also difficulties when it comes to interpreting coded information. The codification of terms, and how this information is organized, makes recourse to experts essential. The archives of the information services are very characteristic in this regard.¹²⁰ Despite a legal framework that offers substantial guidance, the search, extraction, and interpretation still necessarily require a purely technical stage. The integrity of evidence may be weakened

because the technical staff is often made up of the same people who worked with the archives under the ancien régime. They find themselves exercising a form of power that, depending on the contexts, goes far beyond their normally technical-administrative role.

As regards the storage of and access to the archives, the following table provides a glimpse on a country-by-country basis. It would appear that public access to the archives has been limited in certain countries by economic and organizational difficulties.¹²¹

TABLE 2

Storage of and access to archives

	CLOSED	VICTIMS	PERSONNEL/ INFORMANTS*	RESEARCHERS	JOURNALISTS	PUBLIC
Germany		X	X			
Bulgaria	X					
Estonia						X
Hungary		X		X		List in 2030
Latvia						X
Lithuania		X	With authorization			
Macedonia ^{122**}		X				
Poland		X		X	X	
Romania	Restricted CNSAS					
Serbia- Montenegro ^{123**}	X					
Slovakia		Files				List names ¹²⁴
Czech Republic		Files				List names, Files upon request

* Personnel/informants: the persons subject to a vetting process.

** Solely for information, not for vetting, in these two countries.

KEY INFORMATION-MANAGEMENT LESSONS LEARNED FROM LUSTRATION IN THE POST-COMMUNIST BLOC

This overview of the various lustration processes in the countries of the former communist bloc in Eastern Europe provides us with a number of key lessons concerning the management of information in post-authoritarian contexts. These include the following:

- Even if the archives of a former authoritarian regime have undisputed value, the fate of these archives and the way they can contribute to a vetting process will remain controversial. The structure, integrity, reliability, and volume of the information condition the vetting feasibility and outcomes.
- As in a post-conflict situation, the means available and methods used to process the information have a substantial impact on the vetting results.
- Basing a vetting process entirely on the former authoritarian regime's archives will unavoidably result in a questionable process. It is tantamount to grounding the entire process on information that was not originally collected for the process.

INFORMATION, VETTING, AND OTHER TRANSITIONAL JUSTICE MEASURES

Hardly any information, or even thought, exists on the possibility of using information collected through vetting processes in other transitional justice measures, but one can still raise a few important issues. I emphasize that I am not addressing the legal dimension of this issue here, which is fundamental but not the subject of this study.

In general, it can be said that a court aims to determine the liability of individuals and to punish them accordingly; a vetting process aims to reform institutions by addressing the past conduct of individuals and their links to institutions; and a truth commission aims to account for the social dynamics of the conflict and to participate in developing a collective memory. One can, then, establish a hierarchical model of information collected, processed, and produced by these different measures. To this end, one should introduce an important nuance—distinguishing between specific information and contextual information. *Specific information* is directly relevant for the assessment yielded by each transitional justice measure, whereas *contextual information*

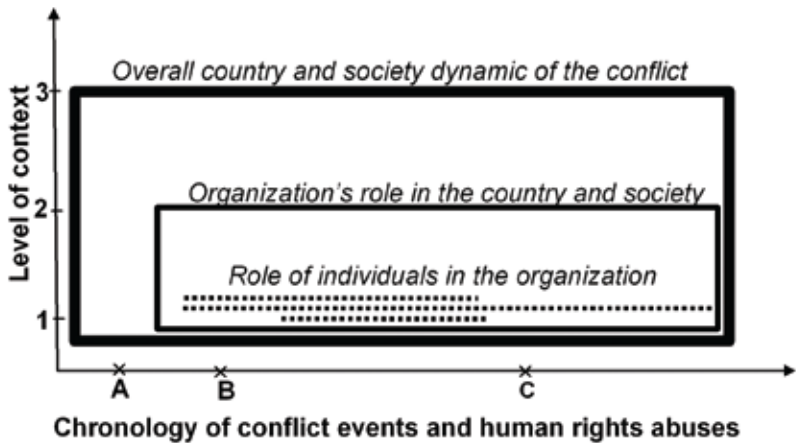
provides a framework for interpretation. These two categories are connected and complementary.

Let us take the example of an existing presidential guard, Alpha, made up of one hundred officers, created by a head of state, directed by officers X, Y, and Z directly subordinated to the head of state, and the activities of which were characterized by gross human rights violations under a given regime and over a specific period of time. In a simplified way:

- A truth commission is interested in gathering specific information that facilitates an understanding of all aspects of Alpha including: its environment and history; the overall state institutional apparatus setting and Alpha's position within that; its (formal and informal) relationship with the head of state; its role in the conflict or authoritarian regime; its genesis; its mandate; its violations; its victims; the role of X, Y, Z, and so on. All this information is very relevant for the truth commission and can therefore be considered specific to it.
- A vetting commission, however, seeks in particular to collect, process, and produce specific information about the past and current activity and role of each of Alpha's members (including X, Y, and Z) who wishes to hold a public position in the post-conflict institutional framework. This information is specific to the vetting process, while much of the information in which a truth commission is interested (such as Alpha's environment and history, etc.) is contextual.
- A court, for its part, examines all information regarding the individual responsibility of X, Y, or Z with respect to specific violations against individuals.¹²⁵ Everything else is contextual.

Information that is specifically relevant for truth commissions can be contextually relevant for vetting efforts and prosecutions, while information that is specifically relevant for vetting can be contextually relevant for prosecutions. The following diagram depicts a theoretical hierarchy of the relevance of information relative to each transitional justice measure. The largest area represents the information relevant to truth commissions, the medium area the information relevant to vetting processes, and the dotted lines the information relevant to prosecution efforts.

GRAPH 1
The relevance of information to transitional justice measures



A court prosecutes only leaders or members of an organization, the organization being a tool with which, or offering an adequate environment in which, an individual commits abuses. It does not make sense to think of individuals totally disconnected from any kind of organization being prosecuted by a court for war crimes or other abuses. Having said this, prosecution is conditioned upon factual evidence regarding individual responsibility for specific abuses. (However, it must be remembered that a court will neither seek nor be able to prosecute all members of an organization.)

In a vetting process, individuals are subject to vetting because they wish to hold (or currently hold) a position in a public institution. Many of these individuals will not have been involved in any past abuses, but may still be subject to vetting. That is to say, although theoretically the same individuals may be subject to both prosecution and vetting, in reality these measures will generally not target the same people. In Bosnia and Herzegovina, however, the vetting of the police included prosecution by the ICTY as a criterion to bar individuals from exercising police powers. But this was not about the use of a special court's substantive information in a vetting process; this was about interpreting the consequences of being targeted by both transitional justice measures. (This example is explained in more detail below.)

While a court will seek to prove the responsibility of an individual for a specific abuse, it is unquestionable that doing so requires a good understanding of the responsibilities and activities of, as well as the links between, the members of that individual's organization. Such a contextual understanding can be provided through information used in a vetting process (although not all members of the organization will be subject to a vetting process, since not all of them will seek positions in public institutions).

Furthermore, both a special court and a vetting process could certainly benefit from the information processed by a truth commission. A truth commission, which seeks a more comprehensive understanding of the functioning of a former authoritarian regime or the dynamic of a conflict, offers an interpretative framework for both other measures. In addition, a truth commission may have collected information that is specifically relevant to both these measures.

The challenges of interoperability of the information used by transitional justice measures can be illustrated, concretely, by returning to the case of Bosnia and Herzegovina.

THE LINK BETWEEN UNMIBH AND THE ICTY

UNMIBH had concluded an agreement with the Office of the Prosecutor of the ICTY to share information. The Netherlands had made available two police officers (liaison officers) to UNMIBH, who were stationed in The Hague in the Office of the Prosecutor. They received the lists of police under the certification program. When the police officers consulted the tribunal's archives, however, they turned up just one "hit"—the name of one police officer appeared in the archives. This information-sharing mechanism, then, did not prove very useful for vetting the police. This was for two reasons.

First, the information received by UNMIBH was too limited to render any substantial interpretation. The possible informal contacts between the international police of UNMIBH in Sarajevo and at The Hague would have made it possible to learn a bit more about the nature of the information that was in the archives, without it being possible, however, to use that information. The organizational structure of a tribunal serves its own needs—it is focused on specific cases and persons alleged to be guilty. Searching for the name of a policeman in such a large volume of information as constituted by all the documents collected in the context of a complex investigation, which was not structured to respond to this demand, was very cumbersome. Second, and no less important, the margin of error caused by spelling problems and the large number of persons with the same names was too great.

This is not to say that neither of these transitional justice measures held information that was specifically relevant to the other. However, the main constraints to improving the interoperability of such information lies in the fact that both measures were placed under different international authorities, which operated according to different standards, cultures, resources, priorities, and so on. An attempt to create a formal and functioning system of information sharing would have required two significant international institutional bodies, UNMBIH (and beyond, including the UN Department of Peacekeeping Operations and the UN Security Council) and the ICTY, to come together and agree upon common grounds. In this case, the institutional challenge defeats the operational one.

This example points to a critical issue. It seems reasonable to think that the interoperability of information may be enhanced when all transitional justice measures operate under a single, overarching, institutional framework. This framework should guarantee the independent and complementary functioning of each measure.

CONCLUSIONS

THE IMPACT OF THE TYPE OF CONTEXT ON THE VOLUME, NATURE, AND STRUCTURE OF VETTING INFORMATION

The link between the transitional context and the use of information in a vetting process appears clearly in both the post-totalitarian contexts of the communist bloc and post-conflict contexts generally. Whereas post-communism is characterized by the mirage of certainty—"we'll finally know" thanks to the "kilometric memory" of the authoritarian machine—post-conflict situations, in contrast, are characterized by blank pages on the history of the individuals, the organizations, and the conflict in general, pages that must be written before taking action. This leads to a number of conclusions. First, governments in post-authoritarian transitions should not think of the archives of the former governments as the sole source of information for an effective vetting process. Second, during conflicts it would be desirable to sensitize civil society, the international institutions, the media, and all other actors who fight forgetting and impunity about the importance of the information collected during the conflict and the different ways in which it could be used in the mechanisms of transitional justice. Third, in post-conflict contexts, a program aimed at taking a census of or registering the personnel who are part of the major institutions, according priority to those in charge of civilian security

and internal security in the country, is a prerequisite for laying the bases for a successful transition. Taking stock in this way creates a realistic groundwork to secure a vetting process and initiate a broad institutional reform program. In addition, it is important that this process of taking stock be based on a limited amount of information.

THE IMPACT OF THE OPERATIONAL DIMENSION ON THE SUBSTANCE OF VETTING

As a general rule, the operational dimension (means, technology, expertise, tasks, planning, etc.) substantially affects not only the functioning but also the results of vetting. It appears that this dimension, independent of the context, is not given its due by the decision makers designing vetting processes. The expectations of society and of politicians are based on norms, despite operational realism. It appears, in addition, that the vetting processes are designed by politicians and jurists in the absence of an information manager or expert in information management. Again, this general point leads to a number of implications. First, the design of a vetting process, regardless of the context, should adopt the following approach: (1) identify the goals of the vetting process; (2) identify the information needed; (3) involve experts to take inventory of the existing information, to evaluate the efforts needed to process that information, and to collect and produce the information that is lacking; and (4) reconcile the expectations, goals, persons targeted, and resources available, all within an acceptable timetable, before implementing the process. Second, and more specific to post-conflict situations, it is important that the team in charge of managing the vetting process be multidisciplinary and that it bring together capacities in program management, information systems, law, and political and social sciences.

OPERATIONAL IMPLEMENTATION NECESSARILY RAISES THE QUESTION OF POWER

Although noting the power of experts is nothing new, I will emphasize that post-conflict contexts characterized by a lack of institutional structure and a high degree of uncertainty offer enormous opportunities to operational actors. This is certainly true for the management of a huge volume of highly specialized information. It is important, therefore, to provide a legal framework for the work of the technical personnel with procedures to ensure oversight and transparent management of their activity.

SYNERGIES OF NEEDS IN TERMS OF CONTEXTUAL INFORMATION FOR
THE VARIOUS MECHANISMS OF TRANSITIONAL JUSTICE

As discussed above, certainly at the general level synergies may arise among the transitional justice mechanisms in relation to the sharing of information. This suggests putting in place a sufficiently exhaustive and factual document collection endowed with a flexible and rich indexing system that answers the needs of the various mechanisms. Such a collection of documents would support the emergence of a common frame of reference for all the mechanisms. In addition, it goes without saying that such a documentation center, which would bring together so much sensitive information, would become an important power center, with all the risks that this entails. Furthermore, as the Internet has demonstrated by becoming a powerful medium for human rights activists,¹²⁶ new technologies offer new possibilities in the realm of information. The referencing, classification, archiving, and uploading to the Internet of all the information important for transitional justice could be one of the means of establishing such a collection of documents.

Translated by Charles H. Roberts

APPENDIX

Table recapitulating vetting mechanisms and sources of information used

COUNTRY	VETTING MECHANISM	INFORMATION/SOURCES FOR VETTING
Germany	<p>1991 law on Stasi files</p> <p>1992 creation of the Federal Commission (Gauck's Office)</p>	<p><i>Institutional</i>—<i>Stasi Files</i>: 180 km of archives (remaining after partial destruction), access to victims and to defenders; in part, personnel files and archives of the Communist Party (e.g., in Dresden), as well as the personnel files for employment after reunification.</p> <p><i>Defendant</i> : Questionnaire/Hearing</p>
Bulgaria	<p>Several laws blocked (Constitutional Court)</p> <p>Law on academic milieu</p>	<p><i>Institutional</i>—<i>Files of secret services</i>: at the Ministry of Interior (partially destroyed and not accessible to the public for thirty years)</p>
Estonia	<p>Law on citizenship (1992, 1995): Includes limitations related to activities with the secret services or the Communist Party under the USSR</p> <p>Declaration on moral character, collaboration with the KGB implies a hearing with the security services</p>	<p><i>Institutional</i>—<i>Files of the KGB</i>: Archives partially destroyed or transferred to Moscow, storage of remaining files in the state archives accessible to each citizen.</p> <p><i>Defendant</i>—<i>Declaration of Moral Character</i>: agents must make a declaration of moral character of never having worked for the KGB.</p>
Hungary	<p>1994 lustration law (ties to former secret police) directed at twelve thousand administrative and elected officials</p> <p>Creation of commission on lustration</p> <p>Lustration by category of persons (7,872 persons)</p> <p>At least two types of data required for evidence in archives.</p>	<p><i>Institutional</i>—<i>Files of secret services</i>: partially destroyed (over 90% recruitment files destroyed in 1989), other archives at the Office of History (created in 1996), or classified as secret. Access for selection panels, victims, and researchers. List of information on vetted agents accessible in 2030.</p> <p><i>Institutional</i>—<i>various</i>: Tracking of payments for services rendered to secret services, other documents.</p> <p><i>Defendant</i>—<i>Hearing</i>: Until 2000 compulsory hearings</p> <p><i>Civil society</i>—<i>Internet lists</i>: Several lists of names circulate electronically on the Internet</p> <p><i>Civil society</i>—<i>various</i>: Testimonies of victims, views of experts, etc.</p>

COUNTRY	VETTING MECHANISM	INFORMATION/SOURCES FOR VETTING
Latvia	<p>1994 lustration law</p> <p>Former KGB agents must report to the National Office of Historical Memory¹²⁷</p> <p>Investigation into candidates for elected office and certain administrative posts</p>	<p><i>Institutional</i>—<i>Files of the KGB</i>: Archives partially destroyed or transferred to Moscow, storage of remaining files at the National Office of Historical Memory. Free access.</p>
Lithuania	<p>Several obstacles by the Supreme Court</p> <p>1991 former KGB agents cannot hold high-ranking administrative positions</p> <p>1991 decree: Parliamentary commission on the review of secret files to ban the Communist Party from elections.</p> <p>1999 lustration law, KGB agents, who must report within six months to the special commission¹²⁸</p>	<p><i>Institutional</i>—<i>Files of the KGB</i>: Archives partially destroyed or transferred to Moscow, and in part returned to Lithuania and stored in the state archives (first shipment of two thousand boxes containing more than forty-two thousand files). Largest collection of documents in the Baltic countries. Access to files for victims and defenders after authorization.</p>
Macedonia (for information)	<p>Law on the handling of the files of the secret services in 2000.</p>	<p>Access for victims to fifteen thousand files</p>
Poland	<p>Lustration law in 1997</p> <p>Special court for lustration 1997</p>	<p><i>Institutional</i>: Archives of the former Ministry of Interior and security services stored at the Institute for the National Remembrance, created in 1999. Access for victims, journalists, and researchers</p> <p><i>Civil society</i>—<i>Lists of names</i>: in 1992 "list of agents," in 2005, "Wildstein's List" (Wildstein is a journalist) includes two hundred forty thousand names</p>
Romania	<p>1999 law created the National Council for the Study of the Archives of the Securitate/public access</p> <p>CNSAS (review of the files of the candidates for administrative positions)</p>	<p><i>Institutional</i>—<i>Files of Securitate</i>: Archives (18 km of files) transferred in 2005 to CNSAS. Restricted access CNSAS</p>

COUNTRY	VETTING MECHANISM	INFORMATION/SOURCES FOR VETTING
Serbia and Montenegro (for information)	Law on the secret files, of 2002, overturned by the Constitutional Court in 2003	<i>Institutional</i> — <i>Files of secret police</i> : Archives of the secret police closed, not used, and not accessible
Slovakia	1991 lustration law for five years 2002 law on the Institute for the Memory of the Nation/public access	<i>Institutional</i> — <i>StB files</i> : Archives of the secret police to the Institute for the Memory of the Nation (www.upn.gov.sk). ¹²⁹ In 2002 public access to the list of names, access to files for the victims (their file, those of the StB agents, and those of the persons who turned them in)
Czech Republic	Lustration law in 1995, for five years, renewed in 2001 for another five years Law on the protection of secret data, in 1998	<i>Institutional</i> — <i>StB files</i> : Archives of the secret police to the Ministry of Interior (www.mvcr.cz), to the National Bureau of Security, access for victims, since 2002 public access to the list of names, access to files upon request. Publication of a list of seventy-five thousand names of official collaborators by the Ministry of Interior in 2003 <i>Civil society</i> — <i>List of 20,000</i> : List of twenty thousand names by the dissident P. Cibulka (www.cibulka.com)
South Africa	No formal vetting mechanism Streamlining to improve representativeness in the administrations and large companies	<i>Institutional or private</i> — <i>Personnel file</i> : Use of personnel files to promote the skills of black personnel
Argentina	No formal vetting mechanism. Alternative: challenging promotions in the military and confirmations of electoral positions.	<i>Institutional</i> : Report of the CONADEP/ Personnel File/ Special investigation <i>Civil society</i> : Reports of human rights NGOs, research center (CELS), Permanent Assembly for Human Rights (APDH), religious associations, victims' testimony, written press, hearing

COUNTRY	VETTING MECHANISM	INFORMATION/SOURCES FOR VETTING
Bosnia and Herzegovina	<p>Law on free access to information (2000 and 2001, not used)</p> <p>Ad hoc procedure of the United Nations police mission (police personnel)</p> <p>Decisions of the High Representative</p> <p>High Judicial and Prosecutorial Council</p>	<p>POLICE</p> <p>Institutional</p> <p>Lists of personnel: Lists of police personnel of all the police forces (fifteen) and personnel files</p> <p>Committee on housing: Decision on expulsion from housing illegally occupied</p> <p>Courts: Guilty verdicts</p> <p>International Criminal Tribunal for the former Yugoslavia: Confidential information</p> <p>UNMIBH: Investigation, reports on the action of the police</p> <p>Civil society: NGOs and press: Investigative reports by human rights NGOs (local and international), media</p> <p>Defendants - Individual questionnaire: Individuals in question fill out a questionnaire and a statement (twenty-five thousand data sheets)</p> <p>JUDICIAL SYSTEM</p> <p>Candidates: Individual questionnaire</p>
Haiti	In proposal form	Police/Applicants: Form identifying them
Kosovo	UNMIK	<p>Institutional sources: Ad hoc investigation by UNMIK</p> <p>Applicants: Questionnaire</p>

COUNTRY	VETTING MECHANISM	INFORMATION/SOURCES FOR VETTING
Liberia	United Nations Mission in Liberia (UNMIL) Accra Accords Security Council Resolution 1509 (2003)	POLICE Police and applicants: Registration form
DRC	No law - Project to register police personnel and to take a census of other public servants	PROJECT Police and census public officials Institutional - personnel file: Updating personnel file based on questionnaires Employee - Individual questionnaire: Each employee (or supposed employee) fills out questionnaire
Rwanda	—	JUDICIAL SYSTEM (includes judicial police) Institutional: Ministry of justice and information services Applicants: Registration form
East Timor	United Nations Transitional Administration in East Timor (UNTAET) : United Nations Mission of Support in East Timor (UNMISSET) Security Council Resolutions 1272 (1999) and 1410 (2002)	POLICE Applicants: Registration form

NOTES

- 1 Literally, “vetting” means “meticulous examination.” In the context of transition, one finds, in French, the idea of *épuration*, which goes further, as it includes a notion of finality and purity not found in the English word “vetting.” French also has the term *criblage*. In the dictionary of the French Academy (<http://atilf.atilf.fr>), *criblage* designates the “action of passing through a sieve,” but it can also designate the “result of this action.” Under the entry for *crible* (sieve) one finds the figurative expression “to pass opinions through a sieve” (*passer au crible les opinions*), which means “to examine them closely, to screen them, eliminating those which are false or bad.” Vetting commissions known as *commissions de criblage* were set up at the end of the Second World War to identify collaborators, but unfortunately they were also used during the war to screen Jews to deport them. The word *criblage* remains the most appropriate and relevant term in the transition context.
- 2 See “Vetting Public Employees in Post-Conflict Settings: Operational Guidelines,” in this volume.
- 3 This analysis is based on the case studies in this volume (Argentina, Bosnia and Herzegovina, the Czech Republic, Germany, Greece, Hungary, Poland, El Salvador, and South Africa), reports and articles concerning other countries (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Macedonia, Romania, Serbia and Montenegro, and Slovakia), information collected during on-site missions (Afghanistan, Democratic Republic of the Congo, East Timor, Haiti, Liberia, Rwanda, and Sierra Leone), as well as studies of the archives of authoritarian and repressive regimes. The many documents consulted on vetting do not specifically address the issue of information (or do so only to a limited extent). The vast majority of vetting processes have taken place in the context of post-authoritarian transitions, and these have been the most documented. There are only a few examples of vetting in post-conflict contexts. For such a context, attention will be more specifically focused on the vetting of the police by the United Nations Mission in Bosnia and Herzegovina (UNMIBH).
- 4 Pierre Larousse, *Le Petit Larousse illustré 1999* (Paris: Larousse, 1998).
- 5 See chapter by Czarnota in this volume. In Poland the Parliament specifically names the first three categories.
- 6 The experiences taken into account in this study have used the following sources: reports of United Nations peacekeeping missions, international police missions (CIVPOL), the Office of the High Commissioner for Human Rights (UNOHCHR), the Office of the High Commissioner for Refugees (UNHCR), and other UN agencies. Reports are also generated by the International Organization for Migration (IOM), the Organization for Security and Cooperation in Europe (OSCE), the North Atlantic Treaty Organization (NATO), and ad hoc agencies such as the Office of the High Representative in Bosnia, as well as special tribunals.

- 7 Antonio Gonzales Quintana, "Archives of the Security Services of Former Repressive Regimes, Report prepared for UNESCO on behalf of the International Council on Archives" (Paris: United Nations Educational, Scientific and Cultural Organization, 1997).
- 8 Antoon De Baets, "The Dictators' Secret Archives: Rationales for Their Creation, Destruction and Disclosure," in *Scholarly Environments*, ed. Alasdair A MacDonald and Arend H. Huussen (Groningen: Peeters Publishers, 2004).
- 9 It also includes religious organizations, some of which are heavily involved in the defense of human rights, as in Latin America.
- 10 This is done through forms, questionnaires, or testimony, either in hearings or in written form.
- 11 See chapter by Priiban in this volume.
- 12 The author spent three-and-a-half years in Rwanda, from September 1994 to June 1998, working mainly for the United Nations High Commissioner for Human Rights, and directed the first phase of the European Union's program to support rehabilitation of the judicial system, which began in June 1997.
- 13 To date, the final status of Kosovo, under United Nations administration, has yet to be determined.
- 14 By the ICTJ for these four countries, and by the UK Department for International Development (DFID) for the DRC.
- 15 Rwanda has proceeded to vet candidates for the positions of judicial police inspector, court clerk, alternate prosecutors, and judges. This procedure unfolded at the time of the formation of each of these professional corps (which was essentially undertaken by the international community, beginning in 1995). Vetting was undertaken under the caretaker authorities and carried out by the intelligence services. The institutions and infrastructure were totally ransacked and destroyed during the genocide of the Tutsis and the massacre of the moderate Hutus in 1994 and the subsequent flight of the Hutu population and the authorities in the face of the advance and taking of power by the Front Patriotique Ruandais (FPR) in July 1994. The intelligence services undertook investigations and, depending on the result, candidates for training were retained or told they were not eligible. No formal procedure was implemented.
- 16 Note here that while Bosnia and Herzegovina and Kosovo are experiencing a dual transition, both post-socialist and post-conflict, the dominant structural characteristic in both cases is that of a post-conflict society.
- 17 Afghanistan has not yet initiated vetting. A preliminary evaluation was carried out by the ICTJ in April 2005 regarding the implementation of a mechanism for the systematic review of political appointments in the thirty-four provinces. This initial evaluation shows that an eventual procedure would likely have no choice but to rely on the same kinds of sources as the countries cited above.

- 18 De Baets, "The Dictators' Secret Archives," 185.
- 19 This study does not cover Azerbaijan, Belarus, Georgia, Armenia, Moldavia, Turkmenistan, Ukraine, Kazakhstan, Kyrgyzstan, Uzbekistan, or Tajikistan. As of the fall of 1996, there was still no vetting for these last four countries. There is no information after that date for these four countries, or for the other seven cited here.
- 20 Hannah Arendt, *Les origines du totalitarisme* (Paris: Gallimard, Quarto, 2002).
- 21 For an insightful study on rationales for the creation of secret archives, see De Baets, "The Dictators' Secret Archives."
- 22 Stasi in East Germany and Securitate in Romania, SB in Poland, the KGB in Latvia, Lithuania, and Estonia, STB in the Czech Republic and Slovakia, State Security in Bulgaria.
- 23 Bulgaria, Estonia, Germany, Hungary, Latvia, Lithuania, Poland, Rumania, Slovakia, and the Czech Republic.
- 24 See table in the appendix for details on the different measures adopted.
- 25 Outside the framework of this study, in Serbia and Montenegro (which is undergoing a dual transition, post-conflict and post-authoritarian, but largely dominated by the structural characteristics of a post-authoritarian transition) a law on the secret files (2002) was overturned in 2003. Civil society is calling for a debate on the fate of the archives. In 2000 Macedonia voted to adopt a law on the files of the security services.
- 26 Germany, Lithuania, Romania, and Slovakia.
- 27 Hungary, Poland, Romania, Slovakia, and Latvia.
- 28 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 29 See chapter by Czarnota in this volume.
- 30 Gabor Lagzi, "L'Est affronte son passé communiste" (from UFI, Budapest), *Courrier International*, No. 752 (March 31 to April 6, 2005): 37.
- 31 Ibid.
- 32 See chapter by Priban in this volume.
- 33 From the Latin *lustratio*, an act of purification and reconciliation in Ancient Rome during which a solemn sacrifice was offered. Here "lustration" and "vetting" are used interchangeably to refer to the same process.
- 34 In Germany, despite a questionnaire asking for considerable information, attention is focused on ties with the Stasi. See the chapter by Wilke in this volume.
- 35 De Baets, "The Dictators' Secret Archives."
- 36 Wojciech Staszewski, "Je suis sur la liste, mais c'est une erreur" (from *Gazeta Wyborcza*, Warsaw), *Courrier International*, no. 752 (March 31 to April 6, 2005): 40.
- 37 See the chapter by Christiane Wilke, in this volume.
- 38 Rudolf Ungvary, "Comment les services secrets ont assuré leur survie" (excerpts, from *Népszabadság*, Budapest), *Courrier International*, no. 752 (March 31 to April 6, 2005): 42.
- 39 Cynthia M. Horne and Margaret Levi, "Does Lustration Promote Trustworthy Governance? An Exploration of the Experience of Central and Eastern Europe," in *Building a*

- Trustworthy State in Post-Socialist Transition*, ed. Susan Rose-Ackerman and Janos Kornai (New York: Palgrave Macmillan, 2004).
- 40 Ungvary, "Comment les services secrets ont assuré leur survie," 42.
- 41 "Plus d'un million de Roumains ont été des mouchards" (from *Jurnalul National*, Bucharest), *Courrier International*, no. 752 (March 31 to April 6, 2005): 38.
- 42 Michel Foucault, *Surveiller et punir* (Paris: Gallimard, 2002 [1975 first edition]), 161.
- 43 Gonzales Quintana, "Archives of the Security Services."
- 44 See chapter by Priban in this volume.
- 45 De Baets, "The Dictators' Secret Archives," 182.
- 46 "Tous délateurs (sauf moi)" (dossier), *Courrier International*, No. 752 (March 31 to April 6, 2005): 39.
- 47 Gonzales Quintana, "Archives of the Security Services."
- 48 Ungvary, "Comment les services secrets," 42.
- 49 See chapter by Wilke in this volume.
- 50 "The former Soviet bloc and its past: Come clean—but how clean?" *The Economist*, August 14, 2003.
- 51 Lagzi, "L'Est affronte son passé communiste," 37.
- 52 Ibid.
- 53 Ibid.
- 54 Piotr Pytlawkoski and Ewa Winnicka, "Ancien du SB et fier de l'être" (from *Polityka*, Warsaw), *Courrier International*, No. 752 (March 31 to April 6, 2005): 41.
- 55 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 56 "Plus d'un million de Roumains."
- 57 De Baets, "The Dictators' Secret Archives," 192.
- 58 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 59 See chapter by Priban in this volume.
- 60 See chapter by Wilke in this volume.
- 61 Lagzi, "L'Est affronte son passé communiste," 37.
- 62 "Bronislaw Wildstein, héros contesté de la 'révolution morale,'" *Courrier International*, No. 752 (March 31 to April 6, 2005): 41.
- 63 See chapter by Wilke in this volume.
- 64 De Baets, "The Dictators' Secret Archives," 182.
- 65 "Tous délateurs (sauf moi)."
- 66 "Bronislaw Wildstein, héros contesté,"
- 67 "Plus d'un million de Roumains."
- 68 See chapter by Wilke in this volume.
- 69 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 70 See chapter by Czarnota in this volume.
- 71 See chapter by Wilke in this volume.

- 72 Communist Party of the former East Germany.
- 73 See chapter by Wilke in this volume.
- 74 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 75 Lagzi, "L'Est affronte son passé communiste," 36.
- 76 See chapter by Wilke in this volume.
- 77 Ibid.
- 78 Except in Hungary.
- 79 Gonzales Quintana, "Archives of the Security Services."
- 80 Michel Crozier and Erhard Friedberg, *L'acteur et le système* (Paris: Seuil, 1977).
- 81 Office of the High Representative (OHR), United Nations Mission in Bosnia and Herzegovina (UNMIBH), United Nations Mission in Liberia (UNMIL), United Nations Mission in Kosovo (UNMIK), United Nations Stabilization Mission in Haiti (MINUSTAH), United Nations Mission in the Democratic Republic of Congo (MONUC).
- 82 At the time of writing, the post-conflict countries of DRC and Haiti, listed in the table above, are still in the process of planning vetting programs. Haiti has already gone through the registration phase. Liberia went through a succinct but complete exercise, which still needs to be assessed. However, numerous visits of ICTJ vetting experts to these three countries (two visits to Haiti, five to Liberia, and two to DRC between 2003 and 2006) have clearly revealed that one of the major challenges in each of these processes was purely operational.
- 83 The author was the head of the Local Police Registry Section (LPRS) within the United Nations Mission in Bosnia and Herzegovina (UNMIBH), from its creation in the fall of 1999 until April 2001. The LPRS was responsible for the program of registration, authorization, and certification of the police in Bosnia and Herzegovina, supported by the three sections of the Human Rights Office.
- 84 UNMIBH and the International Police Task Force (IPTF, a CIVPOL operation).
- 85 For a detailed study of vetting in Bosnia and Herzegovina, see the chapter by Mayer-Rieckh in this volume.
- 86 UN mission mandates are established by UN Security Council Resolutions.
- 87 See UNMIBH/IPTF Policies IPTF-P01A/2000, IPTF-P02/2000, IPTF-P03/2000, IPTF-P04/2000, and IPTF-P05/2001.
- 88 One police force for each of the political-administrative divisions: the Serb Republic, the Federation of Bosnia and Herzegovina, the District of Brčko, ten cantons, Interpol, and, as of 1999, the Border Police. These police forces were not under the same ministry.
- 89 See procedure IPTF-P02/2000.
- 90 Stabilization Force, made up of NATO member countries and Albania, Argentina, Australia, Austria, Chile, Estonia, Finland, Latvia, Lithuania, Morocco, Russia, and Sweden (see <http://www.nato.int/sfor/organisation/sfororg.htm>).

- 91 Commission for Real Property Claims.
- 92 These are special police units of Bosnian Serbs heavily implicated in ethnic cleansing.
- 93 "I hereby certify that all the information given in this form is true, complete and correct to the best of my knowledge. I understand that any misrepresentation or material omission made on that form will invalidate eventual eligibility to be authorized to exercise police powers."
- 94 For the different logics of vetting (review and reappointment), see Mayer-Rieckh's chapter on review and reappointment processes in this volume.
- 95 United Nations Security Council Resolution 1035, S/RES/1035 (1995).
- 96 The police are organized territorially following the definitions in the Dayton Accords. They are divided between two entities, the Serb Republic and the Federation of Bosnia and Herzegovina. The Federation, in turn, is divided into ten cantons, each with its own police force. One must add the District of Brčko, which is independent of the two entities. In all there are more than two hundred police stations.
- 97 The disproportionate use of force against a Serb citizen has a different meaning depending on whether it occurs in the Serb entity or in the entity dominated by the Croats and Muslims.
- 98 Source UNMIBH–Database "UNMIBH–Local Police Registry Section," on November 4, 2001.
- 99 In addition, the Croat and Bosniak alphabets have letters additional to and different from the Roman alphabet.
- 100 For example, if there are 23,902 persons registered, the total number of files of the persons authorized to exercise police powers (each receives a police card with his or her number), those who were not authorized, and those for whom a decision is pending, should add up to 23,902.
- 101 Thirty working days and ten vacation days, and a rotation of contingents after one year, on average.
- 102 See chapter by Mayer-Rieckh's on Bosnia in this volume.
- 103 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 104 See chapter by Wilke in this volume.
- 105 Kieran Williams, "A Scorecard for Czech Lustration," *Central Europe Review* 1, no. 19 (November 1, 1999), <http://www.ce-review.org/99/19/williams19.html>.
- 106 See chapter by Priban in this volume.
- 107 See chapter by Wilke in this volume.
- 108 Lagzi, "L'Est affronte son passé communiste," 43.
- 109 Gonzales Quintana, "Archives of the Security Services."
- 110 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 111 Pytlawkoski and Winnicka, "Ancien du SB et fier de l'être," 41.
- 112 Gonzales Quintana, "Archives of the Security Services."

- 113 See <http://www.bstu.de>.
- 114 See chapter by Wilke in this volume.
- 115 The scientific community acknowledges number, diversity, interactions, and uncertainty as principal sources of complexity.
- 116 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 117 See chapter by Czarnota in this volume.
- 118 See "Tous délateurs (sauf moi)."
- 119 Gonzales Quintana, "Archives of the Security Services.", para. 3.2.
- 120 Ibid., para. 4.1.
- 121 See chapter by Czarnota in this volume.
- 122 Hatschikjan Magarditsch, ed., *Manual on Lustration, Public Access to Files of the Secret Services and Public Debates on the Past in the Western Balkans* (Salonika: Center for Democracy and Reconciliation in Southeast Europe, March 2005).
- 123 Ibid.
- 124 List of the names of agents identified by lustration.
- 125 Violations can also be against properties or cultural heritage, however in the context of this chapter, I will focus on individuals.
- 126 David Block, "Broadcast and archive: Human rights documentation in the early digital age," http://molodiez.org/dms420/hr_archives.htm; accessed August 26, 2005.
- 127 Lagzi, "L'Est affronte son passé communiste," 37.
- 128 Ibid.
- 129 See "Tous délateurs (sauf moi)."

CHAPTER 11

Due Process and Vetting

Federico Andreu-Guzmán

INTRODUCTION

The question of excluding from public service persons implicated in gross human rights violations and/or crimes (vetting) has taken on special importance today for the effectiveness of the rule of law, and for the strengthening, construction, or reconstruction of a state that guarantees human rights. This issue is clearly linked to the “duty to prevent” that is incumbent on states—their obligation to prevent the recurrence of human rights violations and to take steps to end impunity for such violations. Yet vetting procedures also raise the question of the rights of the persons targeted by such measures, for in the past these measures have repeatedly assumed the dimensions of veritable purges or witch hunts. Although vetting has taken on great importance in recent years in the contexts of democratic transitions, either at the end of armed conflicts or after the collapse of authoritarian regimes, one cannot limit the scope of vetting to these instances alone. In effect, vetting may take place in different situations and vis-à-vis different public sectors, raising different problems and questions. The issues concerning the preventive nature of vetting and its scope of application, in terms of both the sectors of the public administration and the type of conduct targeted, are important for delimiting the procedural guarantees that should be respected in vetting procedures. Establishing regular programs or respecting procedural guarantees is an essential element of vetting programs, which distinguishes them from generalized purges. Nonetheless, although the international human rights organs and courts are divided on the issue of due process requirements in vetting programs, one may deduce from the case law certain criteria and guarantees that generally should be incorporated into vetting procedures.

THE STATE'S DUTY TO GUARANTEE AND VETTING OF THE PUBLIC ADMINISTRATION

Under international law, the state has a dual legal obligation: first, to refrain from violating human rights, whether by act or omission, and second, to guarantee the full enjoyment of fundamental rights. This last obligation includes the duty to prevent human rights violations, and the state is obliged to take the necessary and reasonable measures to this end. This duty to guarantee is based on several international instruments¹ and has been reaffirmed repeatedly by the United Nations General Assembly² and in international case law.³ International case law pointed early on to this duty to guarantee. In effect, one of the first precedents in the case law is the arbitration award of May 1, 1925, rendered by professor Max Huber in the matter of British claims regarding damages caused to British subjects in the Spanish zone of Morocco, in which it was noted that under international law, the state may be held responsible for a failure to prevent offenses: "The State should be held to exercise a higher order of vigilance with a view to preventing the offenses committed, in violation of military discipline and law, by persons who belong to the army."⁴ Accordingly, the United Nations Observer Mission in El Salvador (ONUSAL) concluded that the states' duty to guarantee comprises the whole set of obligations aimed at preventing illegal conduct, and, if necessary, to investigate, prosecute, and punish the perpetrators of such conduct, and to compensate the victims.⁵

The duty to prevent raises the question as to the presence in the public administration—especially within the armed forces, police services, or other security agencies—of persons implicated in gross human rights violations. It is of note that in the periodic reports submitted by the states parties to the International Covenant on Civil and Political Rights, the Human Rights Committee has recommended, among the measures of prevention, that the state refrain from hiring and recruiting to the security forces persons implicated in gross human rights violations, as well as the permanent removal of members of the security forces who were involved in such violations.⁶ The Human Rights Committee has also recommended, on several occasions, suspending state agents implicated in gross human rights violations while investigations into such events are ongoing.⁷

In general, international human rights instruments do not explicitly address the question of vetting. Nonetheless, some instruments provide certain clues. Accordingly, the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*⁸ and the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading*

*Treatment or Punishment*⁹ provide that persons who may be involved in extrajudicial, arbitrary, or summary executions, or in acts of torture or mistreatment, shall be “removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations” (principles 15 and 3(b), respectively). The *Declaration on the Protection of All Persons from Enforced Disappearance*¹⁰ provides, for its part, that the alleged perpetrators of a forced disappearance must be suspended “from any official duties during the investigation” into that crime (article 16).

In addition, and even though they do not address the specific issue of vetting, certain international instruments contain provisions — or, rather, criteria — as regards the procedures for appointments, removals, and revocation for certain categories of public officials, especially in the administration of justice. The existence of those provisions is justified to the extent that they aim to preserve the independence and impartiality of the judiciary and the principle of separation of powers. For example, the *Basic Principles on the Independence of the Judiciary*¹¹ establish the criteria and procedural principles to be followed in the event of an accusation or complaint against a judge in the performance of his or her judicial and professional functions: the right to a fair hearing; the principle (or the right) of an adversary proceeding; and the right to independent review of disciplinary decisions to suspend or remove.¹² The *Basic Principles* also provide that “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”¹³ The *Basic Principles* also provide that “[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”¹⁴ In addition, the *Guidelines on the Role of Prosecutors*¹⁵ set forth the principle of nondiscrimination in recruitment procedures, and, in the case of acts committed outside of the scope of one’s professional duties, the impartial procedures include a hearing and review by an independent body.¹⁶

Nonetheless, the United Nations Commission on Human Rights has adopted and/or recommended certain international standards that, among other issues, address vetting. Accordingly, the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*¹⁷ provide that, as a means of guaranteeing the nonrecurrence of human rights

violations, the state should remove from public institutions those officials and public servants responsible for gross human rights violations, especially those who belong to the armed forces, police, security forces, and intelligence agencies, as well as the judicial sector.¹⁸ The *Updated Set of principles* state that such dismissals or removals from state agencies must be done within the framework of *due process of law* and with respect for the principle of nondiscrimination.¹⁹ The independent expert on impunity, in charge of updating the *Set of principles*, had also noted that vetting procedures “should ensure a hearing and a review by an independent and impartial body.”²⁰

VETTING PROCEDURES AND HUMAN RIGHTS

The main goal of vetting is to ensure a norm-abiding performance of public service through measures that guarantee a structure made up of officials and public servants respectful of human rights. Vetting is aimed at ensuring that persons who have committed crimes or gross human rights violations do not have access to public service or are removed from it. Vetting thus covers both recruitment and appointment to public service, and the dismissal or removal of public employees and state agents.

Accordingly, the state has a duty to vet the public administration as part of its duty to prevent, and this vetting cannot be implemented in just any way. The state also has the duty to respect the rights of persons who are subject to a vetting process.

Depending on the specific circumstances, vetting may infringe on several rights of persons who are vetted: the right to hold a job in the public service in conditions of equality and without unlawful discrimination or unreasonable restrictions;²¹ the right to be protected from unlawful attacks on honor and reputation;²² the right to an effective remedy;²³ the right to the presumption of innocence;²⁴ the right to have one’s case heard fairly and publicly by a competent, independent, an impartial tribunal;²⁵ the right to equality before the law and to equal protection of the law without discrimination;²⁶ and the right to work.²⁷

Vetting is closely related to the right of access, on general terms of equality, to public service. As the Human Rights Committee has emphasized, this right entails “the right and the opportunity [for every citizen], without any distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and without unreasonable restrictions to have access, on general terms of equality, to public service in his country.”²⁸ Yet the committee also emphasized that “this right

does not entitle every citizen to obtain guaranteed employment in the public service”;²⁹ that is, “25(c) does not entitle every citizen to employment within the public service, but to access on general terms of equality.”³⁰ The guarantee of this right, as the Human Rights Committee has indicated, “implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed.”³¹ The committee has also noted that this right implies “a duty, of the State, to ensure that there is no discrimination on the ground of political opinion or expression. This applies *a fortiori* to those who already hold positions in the public service. The rights enshrined in article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.”³² The Human Rights Committee has considered that the conditions of and limitations on the exercise of the rights protected by article 25 — particularly the right of access to public service under equal conditions — should be based on objective and reasonable criteria, and be regulated by law.³³ It has also underscored that, “[t]o ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable.”³⁴ The state should also, as the committee affirms, “ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1 [of the Covenant]”;³⁵ that is, motivations based on race, color, sex, language, religion, political or other opinion, national or social origin, wealth, birth, or any other situation.

The right to the presumption of innocence may also be violated by vetting procedures, especially when they take on the form of purges and the persons subject to such procedures are exposed to popular revenge. Dismissals or decisions not to appoint an applicant based on that person’s participation in a crime or human rights violation, for which the individual has been acquitted by a court, may in certain circumstances also violate the principle of the presumption of innocence. Nonetheless, one must bear in mind that the notion, nature, and scope of criminal liability do not exactly correspond exactly to the notion, nature, and scope of administrative liability of a public official, especially in relation to his or her official duties. Thus, an illicit act may not entail an official’s criminal liability, yet it may imply his or her administrative responsibility as an official. So if a vetting decision is based on a final judgment of a court holding an official or a candidate for public service criminally liable, there would certainly be no violation of the principle of the

presumption of innocence. At the same time, the absence of a judicial decision condemning an official of a crime does not prevent the official from being suspended from certain public functions³⁶ or from being relieved of all official duties for the duration of the investigation.³⁷

Experience shows how certain vetting measures can violate the right to be protected from unlawful attacks on honor and reputation. In particular, certain lustration laws in former socialist countries in Central and Eastern Europe have stigmatized persons for the mere fact that they were officials of the authoritarian regime without having been implicated, directly or indirectly, in the commission of crimes or human rights violations.

There is certainly a need to strike a proper balance that allows a vetting process to proceed while, at the same time, guaranteeing and protecting the rights of persons affected by such measures. As the United Nations Secretary-General has emphasized, this question is of crucial importance for strengthening the legitimacy of official bodies, the restoration of the public's confidence, and the consolidation of the rule of law.³⁸

Vetting measures should be implemented respecting the rule of law, and especially the principle of legality, and “in a manner respectful both of the sensitivities of victims and of the human rights of those suspected of abuses.”³⁹ Accordingly, one fundamental issue is that of procedural guarantees in the vetting process.

CONTEXTS AND SECTORS TARGETED BY VETTING

Vetting may take place in different situations or scenarios and vis-à-vis different sectors of the administration, and in these contexts it may address various problems and issues.

As regards the situations in which vetting policies or measures are implemented, one can schematically identify four typical cases. A first typical case is that of the reconstruction of the army, police, and/or other state security bodies, after their dissolution by provision of law⁴⁰ or their physical disappearance, especially because of the conflict and the destruction of institutions.⁴¹ A second typical case is that of the construction of a new state entity.⁴² A third typical case is that of vetting in the context of the restructuring of the state forces, without these having been dissolved, in the context of the return to institutional or democratic normalcy or upon the conclusion of an armed conflict.⁴³ A final typical case is that of the regular vetting of the public administration in the context of the normal operation of the institutions. In these different contexts, vetting raises different questions. In effect, the first

two typical cases have dealt more—but not exclusively—with problems associated with procedures for recruiting for the public administration. The last two generally raise the issue of the removal of public servants.

In addition, vetting measures may target public servants or prospective public servants in different sectors of the public administration. In effect, vetting targets not only the members of the armed forces, police, or prison services, all of which, given the nature of their activities, are generally the most involved in gross human rights violations such as extrajudicial executions, torture, and enforced disappearances; it may also target other sectors of the state apparatus, such as the judiciary. Vetting measures aimed at the different agencies and services of the executive branch may be very similar in terms of procedures and mechanisms, if not identical in certain cases. Nonetheless, in the case of other branches of government, such as the judiciary, the principles of the rule of law, particularly the principle of the separation of powers, require specific vetting procedures and mechanisms. In the case of the judiciary, vetting should not only pursue the general objective of “cleaning up,” but also ensure the effective independence—functional, structural, and personal—of the judges. The United Nations Special Rapporteur on the independence of judges and lawyers highlighted this aspect: “In the transition periods that follow a domestic armed conflict or the collapse of a dictatorial, authoritarian or particularly corrupt regime, it is logical that judges involved in human rights violations and corruption who wish to retain their posts should be held to account. Even in such cases, the international standards for a fair trial and the Basic Principles on the Independence of the Judiciary must be strictly observed. Otherwise, such ‘cleaning up’ may weaken the judiciary instead of strengthening it and undermine its independence.”⁴⁴

The parallel existence of other situations and procedures may have an impact on vetting measures and on the rights of the persons targeted by such measures. In addition, the existence of judicial and/or disciplinary investigations and/or decisions—especially in criminal matters—with regard to persons subject to vetting measures, especially when they have addressed the same facts taken into account in the vetting procedures, are of special importance.

NATURE AND SCOPE OF APPLICATION OF VETTING PROCEDURES

Vetting procedures are, in essence, administrative. Given their preventive nature and their aim of “cleaning up” the public service, they are not punitive *per se*.⁴⁵ Accordingly, they cannot take the place of procedures that aim to

determine the criminal and disciplinary liability of the individual, and which are based on the legal notions of crime and disciplinary breach. Nonetheless, the separation between typical vetting procedures—that is, those that have the sole aim to clean out the state organs of individuals implicated in gross human rights violations and/or crimes—and criminal judicial proceedings is not absolute. First, criminal and/or disciplinary proceedings generally have an impact on measures taken in the context of vetting. More precisely, judicial and/or disciplinary decisions establishing the criminal or disciplinary liability of individuals should be taken into account in vetting procedures. Furthermore, as indicated by practice in several countries, it may also be seen that, besides their punitive aim, criminal and/or disciplinary procedures can play a role in vetting. Dismissal and removal are the classic forms of disciplinary sanction. In some countries, the criminal legislation provides as possible penalties, both accessory and principal, dismissal as well as disqualification from holding any position in the public administration. Finally, it is true that while vetting does not have, in principle, a punitive aim, vetting procedures are very close to disciplinary procedures when they involve dismissal or removal.

The material scope of the application of vetting measures, that is, the conduct that is the basis of such measures, is extremely important. The conduct targeted by vetting measures should be circumscribed to gross human rights violations and crimes under international law, as well as to acts criminalized under domestic criminal legislation. Including crimes under international law as conduct providing a basis for vetting measures should be independent of whether these crimes are criminalized in the domestic law, given the autonomous nature of these crimes and the fact that their lack of criminalization under domestic law does not relieve the person who committed them from responsibility under international law.⁴⁶

Other conduct may be included in the list of acts or omissions giving rise to vetting measures. The debates on the lustration laws in the former socialist countries of Central Europe have posed the question of the need to remove from the state administration those who “held high positions in the former totalitarian communist regimes” and who “have shown no commitment to or belief in [democratic principles] in the past.”⁴⁷ Nonetheless, experience shows us that the several cases in which mere membership in a political party or the public administration has itself been the basis for denying people access to or removing them from public service, without taking into account the responsibility in crimes or human rights violations of the persons hit by vetting measures, have transformed such measures into purges and given rise to all sorts of vengeance. Such measures are based on a criterion of collective responsi-

bility and impose a collective sanctions regime, both of which are prohibited by international law. This was the case, for example, of Law 445/1991 of the Czech Republic, known as the Screening Act, which prohibits certain persons from having access to key positions in the public administration and the judiciary because of the posts they held up until 1989.⁴⁸ The Human Rights Committee of the United Nations has found that such vetting measures raise “serious issues under article 25 of the Covenant”⁴⁹ and it recommended that this law not be “enforced in a blanket manner and...not [be] used as a mechanism to deny persons access, on general terms of equality, to positions in the public service.”⁵⁰ The International Labour Organization has also criticized this legislation because it bases exclusion from public service on one’s political and ideological views.⁵¹ The Secretary-General of the United Nations has also criticized such measures because they constitute “wholesale purges...involving wide-scale dismissal and disqualification based not on individual records, but rather on party affiliation, political opinion, or association with a prior State institution.”⁵²

In this context it is important to underscore that in the area of criminal responsibility, forms of objective responsibility⁵³ and collective punishments are banned by international law.⁵⁴ Subjective responsibility in criminal matters and individual criminal sanctions are a principle of criminal law and a peremptory norm of international law.⁵⁵

The issue of the criminal responsibility of individuals for their membership in a group or entity implicated in criminal activities was posed by the Nuremberg trials, against the horrors committed by the Nazi regime, for the Nuremberg Statute established objective criminal responsibility for membership in certain organizations of the Third Reich.⁵⁶ Nonetheless, while the Nuremberg tribunal decided to declare the organizations targeted by the statute as criminal, “all the members of these groups were not recognized as criminals from the mere fact of their membership in such groups.”⁵⁷ In effect, the tribunal stayed away from any application of objective individual criminal responsibility. Accordingly, for members of one of these groups to be declared criminal they must have engaged voluntarily and knowingly in the criminal aims of the group or must have participated in the crimes over which the Nuremberg tribunal had jurisdiction, that is, war crimes, crimes against peace, or crimes against humanity.

This principle was reaffirmed in article 33 of the *Fourth Geneva Convention of 1949*, and article 75 of the *Additional Protocol to the Geneva Conventions of August 12, 1949, relating to Protection of the Victims of International Armed Conflicts (Protocol I)*, and article 6 of the *Additional Protocol to the Geneva Conventions of August*

12, 1949, relating to *Protection of the Victims of Non-International Armed Conflicts*. The International Committee of the Red Cross, in its comment on article 75 (section 4(b)) of Protocol I, noted: “After the Second World War and ever since, international public opinion has condemned convictions of persons on account of their membership in a group or organization. Objections were also raised against collective punishment inflicted indiscriminately on families or on the population of a district or building. . . . It was therefore decided to outlaw all convictions and punishments which are not based on individual responsibility—in accordance with the now universally accepted principle that no one may be punished for an act he has not personally committed—as well as reprisals.”⁵⁸

The principle of individual responsibility is equally fundamental in the disciplinary area, though its scope is different given the nature of disciplinary responsibility and the legal duties of the public servant, the breach of which is the basis of the notion of disciplinary infraction.

To the extent that vetting procedures generally target conduct characterized as criminal, either by domestic or international law,⁵⁹ the principle of individual responsibility cannot be ignored. As highlighted by the United Nations Secretary-General, vetting measures should be based on the individual participation in and responsibility for past abuses of public servants, and on their individual record.⁶⁰ Along the same lines, and in the framework of the lustration or “decommunization” laws, the Parliamentary Assembly of the Council of Europe emphasized that “in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Guilt, being individual, rather than collective, must be proven in each individual case—this emphasizes the need for an individual, and not collective, application of lustration laws.”⁶¹ The “Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law”⁶², whose application has been suggested by the Parliamentary Assembly, recommend in this regard that “No person shall be subject to lustration solely for association with, or activities for, any organization that was legal at the time of such association or activities. . . or for personal opinions or beliefs.”⁶³ Nonetheless, as regards high-level public officials, these principles establish a criterion that is certainly questionable from the standpoint of the presumption of innocence and the burden of proof. In effect, guideline (h) provides that “where an organization has perpetrated gross human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organization, unless he can show that he did not participate in planning,

directing or executing such policies, practices, or acts.” While the principle of individual responsibility for negligent command is recognized in both criminal and disciplinary law,⁶⁴ it would not be similar to a form of automatic and objective responsibility, and shift the burden of proof.

THE CASE LAW ON PROCEDURAL GUARANTEES AND VETTING

As has been highlighted by the Secretary-General of the United Nations,⁶⁵ the United Nations independent expert on impunity,⁶⁶ and the Parliamentary Assembly of the Council of Europe,⁶⁷ one of the key issues in vetting is that of equitable procedures and procedural guarantees. The Secretary-General has also declared: “The inclusion of such due process elements distinguished formal vetting processes from... wholesale purges.”⁶⁸ Nonetheless, the case law of the international human rights organs and courts is divided on the question of the application of guarantees of fair and equitable procedure before a court of law or an impartial body in vetting measures.

THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee (HRC) has considered that in light of article 14(1) of the International Covenant on Civil and Political Rights (ICCPR),⁶⁹ the right to “a fair and public hearing by a... tribunal” applies to criminal indictments and to “rights and obligations in a suit at law.” For the HRC, the notion of “rights and obligations in a suit at law” is based on the nature of the rights in question rather than on the status of one of the parties.⁷⁰ The HRC has also considered that “The imposition of disciplinary measures taken against civil servants does not of itself necessarily constitute a determination of one’s rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1.”⁷¹ The committee draws a distinction between recruitment and appointment procedures, on the one hand, and situations of dismissal or removal, on the other.⁷²

In principle, the HRC considers challenges regarding access to public service (recruitment and appointment procedure) not to fall under article 14(1) of the ICCPR. Accordingly, for example, the committee has considered the procedure for appointment of judges, “albeit subject to the right in article 25(c) to access to public service on general terms of equality, as well as the right in article 2, paragraph 3, to an effective remedy, does not as such come within the purview

of a determination of rights and obligations in a suit at law within the meaning of article 14, paragraph 1.”⁷³ In a different case, involving a candidate for a position in the administration of justice rejected by a nonjudicial body, the committee ruled identically.⁷⁴ This same approach is followed by the HRC with regard to promotions within the public service. Accordingly, in a case regarding denial of a promotion of a noncommissioned officer to the rank of police officer, the committee considered that “the procedures initiated by the author to contest a negative decision on his own request to be promoted within the Polish police did not constitute the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant.”⁷⁵

Nonetheless, the HRC has noted that a candidate for public sector employment should be able to contest his or her nonappointment if his or her rights, especially the right of access to public service under generally equal conditions, have been harmed. In effect, pursuant to article 2(3) of the International Covenant on Civil and Political Rights, the state has an obligation to “ensure that individuals also have accessible and effective remedies to vindicate those rights.”⁷⁶ It should be pointed out that the committee has noted, in general, regarding the clause of the ICCPR on the right to an effective remedy (article 2(3)): “This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2 [of the ICCPR], but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.”⁷⁷

As regards measures for removal or suspension from public service, the HRC considers that challenges of dismissals and/or removals have to do with the right of every person to have challenges regarding their rights and obligations resolved by an impartial court, protected by article 14(1) of the ICCPR. Accordingly, in the case of a former fireman dismissed initially by the regional authorities, in a decision that was then vacated by an administrative court, the HRC considered “that a procedure concerning a dismissal from employment constituted the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant.”⁷⁸

In another case regarding a police officer dismissed as a disciplinary measure by administrative decision and without having been brought before a court with jurisdiction to make such a decision, the HRC “recall[ed] that article 14, paragraph 1, guarantees everyone the right, in the determination

of his rights and obligations, to a hearing by an impartial tribunal or court, including the right of access to a civil court.”⁷⁹ The committee did not find a violation of article 14(1), as a court subsequently ruled on the illegality of the officer’s dismissal and ordered his reinstatement to the police. It should be emphasized that no legal obstacle was posed to the examination of this case of administrative dismissal in light of the right to bring challenges regarding one’s rights and obligations before a court.

In a matter involving the administrative dismissal a noncommissioned police officer, which was challenged in court by the former public servant, but never finally resolved by a court because of a long and tortuous procedure, the HRC considered that the matter “raised issues under articles 14, paragraph 1, 25(c), and 26, in conjunction with article 2, paragraph 3, of the Covenant.”⁸⁰ Given the extreme sluggishness of the different and successive procedures—both administrative and judiciary—pursued to challenge the legality of the dismissal, and the repeated failure to execute decisions, the committee concluded that such a situation was “incompatible with the principle of a fair hearing”⁸¹ and constituted “a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.”⁸²

In another matter, the HRC also held: “While the revocation of appointments within the judiciary must not necessarily be determined by a court or tribunal, the Committee recalls that whenever a judicial body is entrusted under national law with the task of deciding on such matters, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.”⁸³ In another matter concerning the dismissal of 315 judges by a presidential decree adopted outside of the procedures and legal guarantees provided for that purpose, and with no judicial remedy afforded, the Human Rights Committee emphasized: “With regard to article 14, paragraph 1, of the [International] Covenant [on Civil and Political Rights]... the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law.”⁸⁴ The committee also concluded that “those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant”⁸⁵ and found a violation “of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.”⁸⁶

In another case involving a municipal employee dismissed after a municipal procedure, the HRC considered that the disciplinary removal of the

public servant fell within the scope of article 14(1) of the ICCPR.⁸⁷ The committee also noted that “the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.”⁸⁸ The HRC also upheld the importance of several procedural guarantees during disciplinary proceedings: the right to challenge members of the competent organ during disciplinary proceedings; the right to recuse members of the organ competent for ruling on a disciplinary action;⁸⁹ the principle of equality of arms, that is, “that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments”;⁹⁰ and the right to equality before the courts, in the sense that the “procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms.”⁹¹

In sum, the Human Rights Committee draws a distinction between situations of access to public service (recruitment and appointment procedures), on the one hand, and situations of dismissal or removal, on the other. Regarding the first issue, the HRC has considered that it concerns the application of article 25 of the ICCPR, governing the right to “access, on general terms of equality, to public service,” and does not raise the question of the determination of rights in a fair hearing by a tribunal (article 14(1) of the ICCPR). However, the committee has stated that, on this issue, candidates for employment in the public sector have the right to an effective remedy to challenge a decision of nonappointment and to vindicate their right of access to public service protected by article 25 of the ICCPR. Regarding dismissal or removal from public service, the HRC considers that challenges to such decisions belong to the sphere of the right of every person to have her or his rights determined by a tribunal in fair proceedings.

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights (IACHR) has noted on several occasions that the procedural guarantees provided for in article 8 (“Right to a Fair Trial”) of the American Convention on Human Rights⁹² apply to judicial remedies and any judicial procedure (criminal, administrative, civil, tax,

etc.), and to any procedure to contest the acts of authorities that represent an attack on human rights.⁹³ The IACHR has also noted that the guarantees of article 8(2), which establishes the minimal guarantees of criminal procedure, apply to any proceeding to determine or contest rights and obligations.⁹⁴ For the court, the notion of “due guarantees,” in article 8(1) of the convention, for any type of procedure, is based on the notion of “due process of law,” which necessarily incorporates these guarantees. These procedural guarantees are, among others: the presumption of innocence; the right to defense and to be assisted by counsel; the right to prior and detailed notice of the charges; and the right to appeal the judgment before a higher court. These guarantees must be respected “in the administrative process and in any other procedure whose decisions may affect the rights of persons.”⁹⁵ For the IACHR: “In any subject matter, even in labour and administrative matters, the discretionality of the administration has boundaries that may not be surpassed, one such boundary being respect for human rights. It is important for the conduct of the administration to be regulated and it may not invoke public order to reduce discretionally the guarantees of its subjects. For instance, the administration may not dictate punitive administrative actions without granting the individuals sanctioned the guarantee of the due process.”⁹⁶

These principles have been applied by the IACHR in the case of the dismissal of 270 public employees in Panama after a demonstration for labor rights,⁹⁷ and in a matter involving the removal of judges from the Constitutional Court of Peru by the legislature;⁹⁸ for the time being the IACHR has not addressed access to public service. In the *Constitutional Court* case, the IACHR emphasized the specificity of the removals of judges and noted that the procedures for that should be consistent with the *Basic Principles* (especially principle 17) and guarantee the principle of separation of powers and the independence of judges.⁹⁹ While under the separation of powers that is essential to the rule of law, and even though the judicial function is of the exclusive purview of the judicial branch, the court has noted that in the event that other organs or public authorities exercise materially judicial functions, these organs and authorities have “the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.”¹⁰⁰ The approach of the IACHR is, in broad strokes, similar. Accordingly, the IACHR has found that the removal of a judge by an organ that was neither competent nor impartial, without respect for the procedural guarantees of “due process of law” and without the right to an effective remedy to challenge the removal decision, constitutes a violation of the right to due process and to judicial protection.¹⁰¹

THE EUROPEAN COMMISSION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

The European Commission on Human Rights has considered that, in light of article 6 of the European Convention on Human Rights,¹⁰² the guarantees of a fair and equitable procedure before a court do not apply to litigation related to public service, whether it involves the right of access to public service or the removal of one of its members. For the commission the imposition of disciplinary measures to dismiss or remove public employees and state agents does not affect civil rights, because their rights rise from the legal relationship with the public administration, governed by the public law and not by private law. In consequence and given the fact that the scope of article 6 of the European convention is limited to civil rights and obligations as well as criminal charges, the commission has considered that the question of the measures to dismiss or remove public servants is outside the scope of the article 6 of the convention. Indeed, the commission has considered, on several occasions, that disciplinary proceedings entrusted to officials or judges (which primarily had to do with suspension and dismissal measures) do not address a civil right, and, accordingly, fall outside of the scope of article 6 of the European Convention on Human Rights.¹⁰³

The European Court of Human Rights has developed the same approach as the European commission. The court considers that “Disputes relating to the recruitment, careers and termination of service of public servants are as a general rule outside the scope of Article 6 para. 1,”¹⁰⁴ because such disputes do not address a right “civil in nature.” That said, the court considers that article 6(1) of the European convention could apply if the litigious claim addresses a “purely economic” right—such as the payment of a salary, or an “essentially economic” right, and does not involve “primarily discretionary prerogatives of the administration.”¹⁰⁵

Nonetheless, in several cases, and given the different domestic legislations on the public administration and public service, the court draws a distinction between those public servants governed by public law (career service public servants) and those under private law (contractual employees). For the latter, challenges regarding recruitment, career service, and termination address a right “civil in nature” and, accordingly, article 6(1) of the European convention applies. This distinction has been subject to numerous criticisms, both in the doctrine¹⁰⁶ and on the part of certain judges of the European court,¹⁰⁷ since it pointed to unequal protection by the convention of public servants in several member states, to the extent that public servants under public law

are deprived of the article 6 guarantees, while certain of their colleagues, subjected to private law contracts, benefited from them, and this notwithstanding the similarity of their function. In 1999, the European court modified the case law so as to put an end to this situation. In its well-known judgment in the matter of *Pellegrin v. France*, the court expressly indicated the need “to put an end to the uncertainty which surrounds application of the guarantees of Article 6§1 to disputes between States and their servants” and to find a criterion that would make it possible “to afford equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment.”¹⁰⁸ The court decided to adopt a functional criterion to determine whether the litigation raised a question of a “right civil in nature” and to set aside the formal criterion—which legal regime is applicable to the public servant—used until then. For the court, it was a question of rendering an autonomous interpretation of the notion of “public service” that would make it possible to assure equal treatment for public servants in the states parties to the convention, independent of the system of employment used domestically, and whatever the particular nature of the legal relationship between the public servant and the administration (contractual relationship or statutory and regulatory position).¹⁰⁹ The court found the basis for this functional criterion in “the nature of the functions or responsibilities carried out by the person concerned, and verifying whether his employment involves direct or indirect participation in the exercise of public authority and functions aimed at safeguarding the general interests of the state or of other public authorities.”¹¹⁰ Accordingly, the court considered that article 6(1) of the European convention did not apply in disputes “which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities.”¹¹¹ The court considered as an example of such activities, outside of the scope of article 6(1), those of the armed forces and the police.¹¹² Yet, the court considered that other activities of the public service are not excluded from the scope of application of article 6(1).¹¹³

It should be noted that the court justified this exclusion of litigation associated with the public service from the scope of application of article 6 of the convention based on the fact that such public sector jobs “involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State’s sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty.”¹¹⁴

In sum, European case law has considered that the guarantees of a fair and equitable procedure before a court do not apply to litigation related to public service, whether it involves the right of access to public service or the removal of a public employee, because such disputes do not address a right of a “civil” nature. However, the European court admitted the application of guarantees of a fair and equitable procedure before a court in two situations: (a) when the litigious claim addresses a “purely economic” right; or (b) when the nature of the functions or responsibilities of public servants do not involve participation in the exercise of public authority and their functions are not aimed at safeguarding the general interests of the state or of other public authorities.

PROCEDURAL GUARANTEES AND VETTING

Beyond the differences in the case law of human rights bodies and courts, there is clearly a need to identify the procedural guarantees that should be put in place in vetting processes. The Secretary-General of the United Nations as well as other actors on the international scene have raised this question and provided responses.

For his part, the United Nations Secretary-General has emphasized that “procedural protections should be afforded to all those subject to vetting processes, whether current employees or new applicants,”¹¹⁵ and that vetting mechanisms should operate “fairly, effectively and in accordance with international human rights standards.”¹¹⁶ In general, he identified the following procedural guarantees: the right of public servants or candidates for public service, during the investigation, to be informed of allegations against them and to be afforded the opportunity to respond before the entity in charge of the investigation; the right to be informed of the charges within a reasonable time; and the right to appeal an adverse decision to a court or other independent body.¹¹⁷

The Parliamentary Assembly of the Council of Europe, for its part, has noted the importance that vetting measures and the implementation of lustration laws ensure “the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law.”¹¹⁸ The assembly has suggested that the states refer to the “Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law.”¹¹⁹ These guidelines provide: “In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to

have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal.”¹²⁰

Nonetheless, while the implementation of a regular and fair procedure accompanied by procedural guarantees is one of the key issues in vetting, it is no doubt difficult to establish a universal and single procedure for all situations and sectors of public service. At least two aspects should be taken into consideration, without this constituting an exhaustive list. First, and as noted above, vetting measures target several situations that have to do with different prerogatives of the state and that have to do with various human rights and duties of the state. Schematically, these can be summarized in two major situations involving vetting: measures geared to access to public service, through recruitment and appointment procedures; and measures involving the dismissal or removal of active-duty public officials and public servants. Second, vetting addresses the various forces and services of the state apparatus, both of the executive branch (especially the armed forces, police, and intelligence and security services) and other branches of government. Vetting procedures should take into account the principle of separation of powers, which is inherent to the rule of law, particularly with a view to preserving the independence of the judicial system. While certain procedural criteria could be established generally, as regards the judiciary and more particularly the entities involved in recruitment, appointment, and removal, clear rules should be assured to guarantee the independence of the judiciary. This encompasses its functional and structural independence as well as the personal independence of judges.

GENERAL CRITERIA

Nonetheless, apart from these aspects, which require the adoption and implementation of specific procedures and mechanisms, it is possible to draw out certain general criteria for any vetting measure, be it for recruitment, appointment, or removal, and independent of the sector of the state apparatus. Accordingly, the following criteria should be heeded in establishing vetting measures:

- *Legitimacy.* Vetting measures should have as their objective to “clean up” the state forces to remove individuals implicated in gross human rights violations and/or crimes, and to ensure access to and the regular exercise of public service, in keeping with the principles of the rule of law and respect for human rights.

- *Safeguarding human rights.* Vetting procedures should guarantee and safeguard the rights of persons who are targeted by such procedures, especially by offering them a legal remedy. They should, in particular, uphold the principle of nondiscrimination; the right of access to public service in equal conditions; the right to be protected from attacks on honor and reputation; and the right to an effective remedy.
- *Objectivity.* Vetting procedures should be based on objective and reasonable criteria, setting aside any unlawful discrimination as well as prosecution based on political or ideological opinion.
- *Legality.* Vetting measures and procedures should be governed by law so as to ensure they not be taken arbitrarily. Even if certain discretionary powers may be granted for vetting, the conditions in which they are exercised should be established by law.
- *Individual application of vetting measures.* Vetting measures, even collective ones, must be based on the principle of individual responsibility, which includes the principles recognized in the area of command responsibility. Accordingly, they must set aside any form of objective or collective responsibility based, for example, on mere political affiliation or membership in the structures or services of the state.
- *Relative autonomy of vetting measures.* Vetting measures should, in principle, be autonomous in relation to criminal and disciplinary procedures, properly speaking, and cannot replace them. Nonetheless, judicial or disciplinary decisions ruling on the responsibility of the public servant or candidate for public service should be taken into account in vetting.

As regards the procedures themselves, a distinction should be made between vetting in relation to access to public service (recruitment and/or appointment) and vetting in relation to the exercise of public service (measures to dismiss or remove).

CRITERIA AND PROCEDURAL GUARANTEES IN RELATION TO ACCESS TO PUBLIC SERVICE

As regards access to public service, vetting procedures should take into account the principles of merit and equal opportunity associated with access to public service, and the technical competence, objective qualifications, and integrity of applicants. They should also respect and ensure the right of access to public service in generally equal conditions, and the principle of nondiscrimination.

The procedures should also provide for a phase of investigation and verification of the background of a candidate to a public service post. This stage should be under the responsibility of an independent, impartial, and competent body. The members who make up that body should be chosen for their impartiality, competence, and personal independence, especially with respect to the person subject to the investigation and verification. This body in charge of investigation and verification should be different from the one in charge of making the appointment. In the case of the selection and appointment of judges, the body in charge of the investigation and verification, and that in charge of the appointment, should be a judicial body that meets the conditions of independence and impartiality.

In the investigation and verification process, the candidate for public service should be informed of any allegations against him or her, especially regarding his or her involvement in human rights violations or crimes, and he or she should be afforded an opportunity to respond to them before the organ entrusted with the investigation. The victims of the acts attributed to the candidate for public service or their family members, as well as any person who has a legitimate interest, should be afforded an opportunity to put forth their points of view in the procedure, at least in the stage of investigation and verification of the candidate's background.

Finally, the procedures should provide for the right to a judicial remedy to challenge the decision, accompanied by effective guarantees.

CRITERIA AND PROCEDURAL GUARANTEES RELATED TO REMOVAL

As regards vetting that involves removal or dismissal, the procedures should ensure the following minimal procedural guarantees for public officials or public servants:

- The right to prior and detailed notice of the allegations or conduct attributed to the person in question.
- The right to respond and defend oneself from the allegations and attribution of conduct, in keeping with the principles of equality of arms and adversarial proceedings, which implies: having the time and facilities needed to prepare one's arguments; access to the documents needed for this purpose; the opportunity to present one's own evidence; and the right to be assisted by counsel.
- The right to the presumption of innocence.
- The right to a public hearing.

- The right to have the procedure conducted in a sufficiently and reasonably expeditious manner.
- The right to review of a decision to remove or dismiss by a body independent of the organ in charge of the appointment.
- The right to appeal an adverse decision to a court.

The body in charge of the procedure may be judicial or nonjudicial, but in any event it must satisfy the conditions and guarantees of independence and impartiality. To that end, the public servant who is subject to the vetting procedure should have the right to challenge the independence and impartiality of the members or the body in charge of the procedure. In the case of procedures against judges, the body in charge should be judicial, so as to guarantee the principle of separation of powers.

The stage of investigation and verification of conduct attributed to a public servant should be ensured by a body or officials different from the body that rules on the dismissal. This division of labor allows for a more impartial procedure. The members of such a body or the official in charge of the investigation should be chosen for their impartiality, competence, and personal independence. They should also be independent vis-à-vis both the public servant being looked into in the vetting procedure and the institutions or body that employ him. This last aspect is of the utmost importance for avoiding any “solidarity” or *esprit de corps* such as one finds in the armed forces and other state security services.

The victims of the acts attributed to the public servant, or members of their families, as well as any person who has a legitimate interest, should be afforded the opportunity to uphold their points of view and to produce documents or evidence in the procedure. It would also be useful for the institution in charge of overseeing the public administration and respect for human rights, such as the ombudspersons and other national institutions on human rights, to be associated with the procedure.

FINAL CONSIDERATIONS

The question of vetting proceedings—that is, measures aimed at screening and excluding from public service persons implicated in gross human rights violations and/or crimes—is crucial for the effectiveness of the rule of law, the strengthening, construction, or reconstruction of a state that guarantees human rights, and the restoration of the public’s confidence. If vetting is aimed at ensuring that persons who have committed crimes or gross human rights

violations do not have access to public service or are removed from it, there is a need to ensure that the proceedings guarantee the rights of persons who are subject to a vetting process. To do so, vetting processes should be based on objective criteria, conducted by independent and impartial bodies, and provide procedural guarantees to the persons concerned. Fair procedures, with basic guarantees, are a vital element of vetting proceedings and distinguish them from generalized purges.

Translated by Charles H. Roberts.

NOTES

- 1 See, for example: the *International Covenant on Civil and Political Rights* (article 2); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; the *Declaration on the Protection of All Persons from Enforced Disappearance*; the *American Convention on Human Rights* (article 1); and the *African Charter of Human and Peoples' Rights* (article 1).
- 2 See, for example, the United Nations General Assembly, Resolution 51/92, December 12, 1996 (preamble).
- 3 See, for example: Inter-American Court of Human Rights, Judgment of July 29, 1988, *Case of Velázquez Rodríguez*, paras. 166 and 174; European Court of Human Rights, Judgment of March 28, 2000, *In the matter of Mahmut Kaya v. Turkey*, Application 00022535/93; and Human Rights Committee, Decision of March 31, 1982, Communication No. 45/1979, *Maria Fanny Suarez de Guerrero v. Colombia*, CCPR/C/15/D/45/1979.
- 4 United Nations, *Recueil de sentences arbitrales*, vol. 2, 645.
- 5 United Nations Observer Mission in El Salvador (ONUSAL), Report of February 19, 1992, A/46/876 S/23580, para. 28.
- 6 See, for example, "Final observations of the Human Rights Committee: Brazil," CCPR/C/79/Add.66, July 24, 1996, para. 20; "Final observations of the Human Rights Committee: Guatemala," CCPR/C/79/Add.63, April 3, 1996, para. 26; "Final observations of the Human Rights Committee: Colombia," CCPR/C/79/Add.76, paras. 32 and 34; "Final observations of the Human Rights Committee: Serbia and Montenegro," CCPR/CO/81/SEMO, para. 9; "Final observations of the Human Rights Committee: Argentina," CCPR/CO/70/ARG, para. 9.
- 7 See in particular CCPR/C/79/Add.66, para. 20 and CCPR/C/79/Add.76, paras. 32 and 34.
- 8 Recommended by the United Nations Economic and Social Council, Resolution 1989/65, May 24, 1989.
- 9 Adopted by the United Nations General Assembly, Resolution 55/89, December 4, 2000.
- 10 Adopted by the United Nations General Assembly, Resolution 47/133, December 18, 1992.
- 11 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (August 26 to September 6, 1985) and endorsed by the United Nations General Assembly, Resolution 40/32, November 29, 1985, and Resolution 40/146, December 13, 1985; hereafter, *Basic Principles*.
- 12 Principles 17 and 20, *Basic Principles*.

- 13 Ibid., principle 10.
- 14 Ibid., principle 18.
- 15 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (August 27 to September 7, 1990).
- 16 Articles 2(a) and 21, *Guidelines on the Role of Prosecutors*.
- 17 See *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1; hereafter, *Updated Set of principles*. Recommended by the United Nations Commission on Human Rights, Resolution 2005/81, April 21, 2005.
- 18 Principle 36(a), *Updated Set of principles*.
- 19 Ibid.
- 20 *Independent study on impunity* by Ms. Diane Orentlicher, E/CN.4/2004/88, February 27, 2004, para. 61.
- 21 Article 25 of the *International Covenant on Civil and Political Rights*.
- 22 Ibid., article 17.
- 23 Ibid., article 2(3).
- 24 Ibid., article 14(2).
- 25 Ibid., article 14(1).
- 26 Ibid., article 26.
- 27 Article 6 of the *International Covenant on Economic, Social and Cultural Rights*. In this regard, the Committee on Economic, Social and Cultural Rights has considered the lustration laws of the Czech Republic to violate the state's obligations under article 6 of the Covenant (*Concluding Observations of the Committee on Economic, Social and Cultural Rights: Czech Republic*, E/C.12/1/Add.7, June 5, 2002, para. 11).
- 28 Human Rights Committee, Decision of July 14, 1997, Communication 552/1993, In the matter of *Wieslaw Kall v. Poland*, para. 13.2.
- 29 Ibid.
- 30 Ibid., para. 13.6.
- 31 Human Rights Committee, Decision of July 31, 2003, Communication No. 933/2000, In the matter of *Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo*, para. 5.2.
- 32 Human Rights Committee, Decision of July 12, 1996, Communications Nos. 422/1990, 423/1990, and 424/1990, In the matter of *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, para. 7.2.
- 33 Human Rights Committee, General Comment No. 25, "The right to participate in public affairs, voting rights and the right of equal access to public service," para. 4.
- 34 Ibid., para. 23.
- 35 Ibid.

- 36 See principle 15 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* and principle 3(b) of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
- 37 Article 16 of the *Declaration on the Protection of All Persons from Enforced Disappearance*.
- 38 *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, August 23, 2004, para. 53; hereafter, *Report on the rule of law*.
- 39 Ibid.
- 40 As were the cases of the armed forces of Haiti and of the security police of the Ministry of Interior of Poland.
- 41 As was the case of the Rwandan judicial system after the genocide.
- 42 As are the cases of Timor-Leste and the Palestinian Authority.
- 43 As are the cases of Guatemala and El Salvador.
- 44 *Report of the Special Rapporteur on the independence of judges and lawyers*, E/CN.4/2004/60, December 31, 2003, para. 41.
- 45 This preventive and nonpunitive nature of vetting measures has been noted in particular by the independent expert on the question of impunity, Mr. Louis Joinet, of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1997/20/Rev.1, October 2, 1997, para. 43).
- 46 *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal*, adopted by the International Law Commission of the United Nations in July 1950. See also United Nations General Assembly, Resolutions No. 95(I), December 11, 1946; No. 177(II), November 21, 1947; and No. 488(V), December 12, 1950; and *Report of the Secretary-General Pursuant to paragraph 2 of the Security Council Resolution 808 (1993)*, S/25704.
- 47 Parliamentary Assembly of the Council of Europe, *Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems*, adopted June 27, 1996, para. 11.
- 48 It covers members of the dissolved state security police, high-level dignitaries, and secretaries of district committees of the Czechoslovak Communist Party, etc.
- 49 "Final observations of the Human Rights Committee: Czech Republic," CCPR/CO/72/CZE, August 27, 2001, para. 24.
- 50 Ibid.
- 51 International Labour Organization, Decision of February 28, 1992.
- 52 *Report on the rule of law*, para. 53.
- 53 That is, nonsubjective responsibility. The principle of subjective or individual responsibility (*mens rea*) is based on the will and intent of the individual.
- 54 The principle of individual criminal responsibility as well as the prohibition on objective responsibility and collective punishments is expressly recognized by several

- international instruments, most notably: the *Fourth Geneva Convention* (article 33); the *Additional Protocol to the Geneva Conventions of August 12, 1949, relating to Protection for the Victims of International Armed Conflicts* (article 75(4)(b)); *Additional Protocol to the Geneva Conventions of August 12, 1949, relating to Protection for the Victims of Non-International Armed Conflicts* (article 6(2)(b)); *Second Protocol relating to the Convention for the Protection of Cultural Property in the Event of Armed Conflict* (articles 15 and 16); *ICTY Statute* (article 7); *ICTR Statute* (article 6); *Rome Statute* (article 25); and the *Statute of the Special Tribunal for Sierra Leone* (article 6).
- 55 Pierre-Marie Dupuy, “Normes internationales pénales et droit impératif (jus cogens),” in *Droit international pénal*, ed. H. Ascencio, E. Decaux, and A. Pellet (Paris: A. Pedone, 2000), 74. Along the same lines, see also *Report of the Secretary General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, para. 51; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Organization of American States document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 227.
- 56 In effect, articles 9 and 10 of the Nuremberg Statute made reference to the members of the leading entities of the Nazi Party, the *Geheime Staatspolizei* (Gestapo), the *Sicherheitsdienst des Reichsführers* (SD), and the *Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (SS).
- 57 Eric David, *Éléments de droit pénal international—Deuxième partie, la répression des infractions de droit international*, 8th ed. (Brussels: Presses universitaires de Bruxelles, 1999), 362, para. 10.36.
- 58 ICRC Comments on Article 75 of the *Additional Protocol (I) to the Geneva Conventions of August 12, 1949 relating to Protection for the Victims of International Armed Conflicts* (Protocol I), June 8, 1977, para. 3098, <http://www.cicr.org/dih.nsf/e6e558c87e3c38c44125673c0045870a/5cb34a49d5067919c12563bd002db607?OpenDocument>.
- 59 It is important to note that grave human rights violations, such as extrajudicial execution, torture, and forced disappearances constitute crimes and should be subject to criminal prosecution.
- 60 *Report on the rule of law*, para. 53.
- 61 Parliamentary Assembly, *Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems*, para. 12.
- 62 See Council of Europe, “Measures to dismantle the heritage of former communist totalitarian systems,” Doc. 7568, FDOC7568-14032405964F, June 3, 1996, <http://assembly.coe.int/mainf.asp?Link=/documents/workingdocs/doc96/fdoc7568.htm>.
- 63 *Ibid.*, guideline i.
- 64 In the area of criminal law, see in particular: the *Rome Statute of the International Criminal Court* (article 28); the *Statute of the International Criminal Tribunal for the Former Yugosla-*

via (article 7.3); the *Statute of the International Criminal Tribunal for Rwanda* (article 6.3); the *Additional Protocol to the Geneva Conventions of August 12, 1949 relating to Protection for the Victims of International Armed Conflicts (Protocol I)*, article 86(2); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (article 2(3)); the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (principle 19); and the *Code of Conduct for Law Enforcement Officials* (articles 5 and 8). See also: Nuremberg Tribunal, Judgment of October 1, 1946 (Case Frick—euthanasia); Tokyo Tribunal, Judgment of November 12, 1948 (case of responsibility of high-ranking officers and prisoners of war); Judgments of the allied tribunals (re: *Yamashita*, February 4, 1946; *Homma v. United States* [1946]; *Von Leeb*—“German High Command Trial,” October 28, 1948; *Pohl et al.*, November 3, 1947; and *List*—“Hostage Trial,” February 19, 1948); International Criminal Tribunal for the Former Yugoslavia, Judgment of November 16, 1998, Case No. IT-96-21-T, *Prosecutor v. Z. Delalic and others*, para. 734; International Criminal Tribunal for the Former Yugoslavia, Judgment of March 3, 2000, Case *Prosecutor v. Blaskic*—“*Lasva Valley*,” paras. 289 ff.; International Criminal Tribunal for the Former Yugoslavia, Judgment of July 20, 2000, Case No. IT-96-21, *Prosecutor v. Delalic*—“*Celibici Camp*”; and International Criminal Tribunal for the Former Yugoslavia, Judgment of February 26, 2001, Case No. IT-95-14/2, *Prosecutor v. Dario Kordic & Mario Cerkez*—“*Lasva Valley*,” paras. 366–71 and 401.

65 *Report on the rule of law*, para. 53.

66 *Independent study on impunity* by Ms. Diane Orentlicher, para. 61.

67 Parliamentary Assembly, *Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems*.

68 *Report on the rule of law*, para. 53.

69 Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - g. Not to be compelled to testify against himself or to confess guilt.
 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
- 70 Human Rights Committee: Decision of July 25, 2005, Communication No. 1182/2003, In the matter of *Savvas Karatsis v. Cyprus*, para. 6.3; Decision of August 6, 2003, Communication No. 837/1998, In the matter of *Janusz Kolanowski v. Poland*, para. 6.4; and Decision of inadmissibility of August 7, 2003, In the matter of *George Kazantzis v. Cyprus*, Communication No. 972/2001, para. 6.5.
- 71 Human Rights Committee, Decision of July 20, 2004, Communication No. 1015/2001, In the matter of *Paul Perterer v. Austria*, para. 9.2.

- 72 In *George Kazantzis v. Cyprus*, para. 6.5, the Human Rights Committee reaffirmed this distinction.
- 73 *Savvas Karatsis v. Cyprus*, para. 6.3.
- 74 *George Kazantzis v. Cyprus*, para. 6.5.
- 75 *Janusz Kolanowski v. Poland*, para. 6.4.
- 76 *George Kazantzis v. Cyprus*, para. 6.5. For a general approach to the right to a remedy, see Human Rights Committee, *General Comment No. 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant,"* para. 15.
- 77 Human Rights Committee, *General Comment No. 29, "States of Emergency,"* para. 14.
- 78 Human Rights Committee, Decision of July 19, 1994, Communication No. 441/1990, In the matter of *Robert Casanovas v. France*, para. 5.2.
- 79 Human Rights Committee, Decision of July 22, 2002, Communication No. 906/2000, In the matter of *Felix Enrique Chira Vargas-Machuca v. Peru*, para. 7.3.
- 80 Human Rights Committee, Decision of November 4, 1988, Communication No. 203/1986, In the matter of *Rubén Toribio Muñoz Hermoza v. Peru*, para. 8.
- 81 *Ibid.*, para. 11.
- 82 *Ibid.*, para. 12.
- 83 *Savvas Karatsis v. Cyprus*, para. 6.5.
- 84 *Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo*, para. 5.2.
- 85 *Ibid.*
- 86 *Ibid.*
- 87 Human Rights Committee, Decision of July 20, 2004, Communication No. 1015/2001, In the matter of *Paul Perterer v. Austria*, para. 9.2.
- 88 *Ibid.*
- 89 *Ibid.*, para. 10.3.
- 90 *Ibid.*, para. 10.6.
- 91 *Ibid.*, para. 10.7.
- 92 Article 8. Right to a Fair Trial.
 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - a. the right of the accused to be assisted without charge by a translator or inter-

- preter, if he does not understand or does not speak the language of the tribunal or court;
- b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.
- 93 Inter-American Court of Human Rights: Advisory Opinion OC-9/87, “*Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights)*” of October 6, 1987, in Series A No. 9, para. 27; Judgment of March 8, 1998, Case of *Paniagua Morales et al. v. Guatemala*, in Series C No. 37, para. 149; Judgment of January 31, 2001, *Constitutional Court Case (Peru)*, in Series C No. 71, para. 69; Judgment of February 2, 2001, Case of *Baena Ricardo et al. v. Panama*, in Series C No. 72, para. 124.
- 94 Inter-American Court of Human Rights: Advisory Opinion OC-11/90, “*Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights)*” of August 10, 1990, in Series A No. 11, para. 28; *Paniagua Morales et al. v. Guatemala*, para. 149; *Constitutional Court Case (Peru)*, para. 70; and *Baena Ricardo et al. v. Panama*, para. 125.
- 95 *Baena Ricardo et al. v. Panama*, para. 127.
- 96 *Ibid.*, para. 126.
- 97 *Baena Ricardo et al. v. Panama*.
- 98 *Constitutional Court Case (Peru)*.
- 99 *Ibid.*, paras. 73ff.

100 Ibid., para. 71.

101 Report No. 48/00 of April 13, 2000, Petition No. 11,166, Case of *Walter Humberto Vásquez Vejarano v. Peru*, para. 77; and Report No. 30/97 of September 30, 1997, Case No. 10,087, Case of *Gustavo Carranza v. Argentina*, paras. 58, 67, and 68. See also Report No. 24/05 (admissibility) of March 8, 2005, Petition No. 282/04, Case of *Ana María Ruggeri Cova et al. v. Venezuela*, para. 45.

102 Article 6. Right to a Fair Trial.

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

103 European Commission on Human Rights, Decision of October 8 1980, In the matter of *A Police Agent v. United Kingdom*, Application No. 8496/79; Decision of October 10, 1980, In the matter of *A public schoolteacher v. Italy*, Application No. 8686/79; Decision of December 4, 1984, In the matter of *A judge v. France*, Application No. 9931/82; Decision of May 8, 1985, In the matter of *A religious minister with the status of a public official v. the Federal German Republic*, Application No. 10901/84; and Decision of October 14, 1993, In the matter of *A judge v. Kingdom of Belgium*, Application No. 22181/93.

104 European Court of Human Rights, Judgment of August 24, 1993, in the matter of *Massa v. Italy*, Series A No. 265-B, p. 20, para. 26; Judgment of March 17, 1997, in the matter of

- Neigel v. France*, Rec. 1997; Judgment of November 26, 1992, In the matter of *Lombardo v. Italy*, Series A, No. 249-B.
- 105 See, among others: Judgment of September 2, 1997, *De Santa v. Italy*; Judgment of September 2, 1997, *Lapalorcia v. Italy*; Judgment of September 2, 1997, *Abenavoli v. Italy*; Judgment of September 2, 1997, *Nicodemo v. Italy*; Judgment of August 24, 1998, *Benkessiouer v. France*; and Judgment of December 8, 1999, *Pellegrin v. France*.
- 106 See, for example, Pierre Lambert, "Les droits relatifs à l'administration de la justice disciplinaire dans la jurisprudence des organes de la Convention européenne," *Revue trimestrielle des droits de l'homme*. Numero Spécial: Le droit disciplinaire, no. 22 (April 1, 1995): 160–74.
- 107 See, among others, Judgment in *Benkessiouer v. France* of August 24, 1998, rec. 1998,V, p. 2287, concurring opinion of Judge Pekkanen.
- 108 *Pellegrin v. France*, para. 63.
- 109 *Ibid.*, and Judgment of June 27, 2000, in the matter of *Frydlender v. France*, Application No. 30979/96, para. 31.
- 110 *Pellegrin v. France*, para. 64. See also Judgment of July 18, 2000, in the matter of *S.M. v. France*, Application No. 41453/98, para. 19 and *Frydlender v. France*, paras. 30ff.
- 111 *Pellegrin v. France*, para. 66. See also *S.M. v. France*, paras. 19ff. and *Frydlender v. France*, paras. 32ff.
- 112 *Pellegrin v. France*, para. 63, and *Frydlender v. France*, para. 33.
- 113 Accordingly, in the case of a train inspector with the national railway company, the court decided that this function could be considered as "characteristic of the specific activities of the public administration insofar as he acts as one vested with public authority entrusted with safeguarding the general interests of the state or other public authorities." Judgment of September 30, 2004, In the matter of *Pramov v. Bulgaria*, Application No. 42986/98, para. 29.
- 114 *Pellegrin v. France*, para. 65 and *Frydlender v. France*, para. 32.
- 115 *Report on the rule of law*, para. 53.
- 116 *Ibid.*
- 117 *Ibid.*, para. 52.
- 118 *Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems*, para. 12.
- 119 See Council of Europe, "Measures to dismantle the heritage of former communist totalitarian systems."
- 120 Guideline M.

CHAPTER 12

On Preventing Abuse:
Vetting and Other Transitional Reforms

Alexander Mayer-Rieckh

INTRODUCTION

Vetting in post-conflict and post-authoritarian transitional situations is a complex phenomenon, and various plausible aims can legitimately be sought through vetting. In this chapter, I argue that transitional vetting should primarily be understood as a measure to reform abusive institutions. However, as a stand-alone measure, vetting is generally insufficient to ensure that abuses are not repeated. A coherent and holistic approach to transitional reform is necessary — albeit not sufficient — to effectively prevent abuses from recurring. Reform measures to promote institutional integrity and legitimacy are particularly important to address a legacy of abuse and prevent its recurrence in societies emerging from conflict or authoritarian rule. These include, in addition to vetting, structural reforms to provide accountability, build independence, ensure representation, and increase responsiveness, as well as verbal and symbolic measures that reaffirm a commitment to overcome the legacy of abuse and an endorsement of democratic norms and values. Beyond transforming abusive institutions, a coherent and holistic approach to transitional reform will also seek to empower the subjects of state oppression and victims of conflict-related violence to recognize themselves and be recognized as rights-bearing citizens.

As an institutional measure, vetting needs to be adapted to the reform needs of a specific transitional situation and integrated in a coherent institutional reform strategy. The case studies in part 1 of this volume reveal that, in practice, the design of transitional vetting varies considerably. In the concluding section of this chapter, I identify a number of normative criteria and contextual conditions to guide the design of a vetting process in order to effectively contribute to preventing the recurrence of abuses.

VETTING TO REFORM ABUSIVE INSTITUTIONS

A principal rationale for putting in place vetting processes in societies emerging from conflict or authoritarian rule is to transform abusive institutions in order to prevent the recurrence of abuses. In post-conflict Bosnia and Herzegovina, for instance, a vetting process was established for the police mainly because the continued presence of police officers who had committed abuses during the conflict was seen as a primary reason for continued discriminatory law enforcement and ongoing abuse.¹ Relevant decisions, comments, and opinions by international judicial and quasi-judicial bodies, as well as related United Nations documents, also understand vetting as this type of measure.² In its observations on state party reports, the Human Rights Committee regularly recommended, as a measure of prevention, the exclusion from public service of serving employees and applicants who were involved in serious abuses.³ The Inter-American Court of Human Rights stated, for instance, that “subjecting a person to official, repressive bodies that practice torture and assassination with impunity is... a breach of the duty to prevent.”⁴ Similarly, the United Nations Principles to Combat Impunity emphasize the administrative-preventive character of vetting⁵ and list the removal of public employees who are responsible for serious abuses as a principal institutional reform measure to prevent recurrence.⁶ In another example, a report of the United Nations Secretary-General states that “vetting *the public service*... can play an important role in enhancing the legitimacy of *official structures*.”⁷

Others have argued that vetting and the exclusion of abusers is primarily a sanction.⁸ Exclusions from public service provide some sanction as they take away or preempt employment, public authority, and other privileges and benefits of public office. The victims of abuses may experience some satisfaction in seeing that abuse is not rewarded with public privileges. The exclusion from public service of abusers can make victims feel recognized because it manifests the seriousness with which the state takes the violation of their rights.⁹ The sanction effect of vetting is particularly significant in situations where the scarcity of resources in a post-conflict or post-authoritarian context, as well as legal impediments and large numbers of crimes, preclude the criminal prosecution of many abusers, creating a so-called impunity gap.¹⁰ Vetting can help to fill the impunity gap by ensuring that those who are responsible for past abuses but are not criminally prosecuted are at least excluded from public service. While this provides a partial, noncriminal sanction, however, it is not an adequate sanction for serious abuses and should not be used as

a pretext for abandoning criminal prosecutions entirely.¹¹ Substituting a vetting process for criminal prosecutions is likely to be perceived by the victims of abuses as “cheap” justice, letting criminals off the hook.

While punitive justifications play a role in establishing vetting processes, there are good reasons to understand vetting and the exclusion from public service of persons who committed serious abuses primarily as a measure of institutional reform.¹² Citizens, and particularly victims of abuses, are unlikely to rely on institutions that retain or hire abusive individuals. Such institutions are unlikely to be trusted because their members committed serious abuses in the past; the continued employment of these people gives citizens, particularly the victims, little reason to be confident that things have changed and that abuses will not go on. This will be the case even more if the institutions not only keep on abusive members but also hire individuals who are known to have committed abuses.¹³ This lack of trust will make it difficult for such institutions to function effectively. To give an example, citizens will hesitate to report crimes to an abusive police because they cannot trust it to produce expected outcomes. As a result, the police will not be able to effectively investigate and prevent crimes, and the citizens are likely to resort to alternative means to resolve insecurity and violence, possibly by taking the law into their own hands. Vetting processes help to reestablish civic trust and to relegitimize public institutions by excluding from them persons who have committed serious abuses in the past and have breached the trust of the citizens they were meant to serve. Vetting contributes to establishing trustworthiness and, therefore, effective public institutions that respect and protect basic standards.¹⁴

There is a second reason to consider vetting as a measure of institutional reform. In a post-conflict or post-authoritarian setting, public employees may well continue to use informal networks within which they carried out abuses in the past. Such organized networks may destabilize fragile public institutions, resist the institutional reform process, and perhaps even undermine the objectives of the transition. Vetting and the exclusion of abusers, particularly from senior management positions, also contribute to disabling such structures. A frequently stated purpose of lustrations processes in Central and Eastern Europe was, for instance, to reduce the threat posed by former communist officials to undermine the transition to democracy.¹⁵ Dismantling criminal networks in public institutions and disabling abusive structures constitute important contributions to institutional reform in post-conflict or post-authoritarian settings and help to prevent the recurrence of abuses.¹⁶

LINKAGES WITH OTHER REFORMS

As a reform measure, vetting affects the general functioning of the institution and relates in different ways to other institutional reform efforts. Taking into consideration these relationships and adopting a coherent reform approach can help to ensure the effectiveness of the vetting process itself and the institutional reform effort as a whole. First, a vetting process can have significant *effects* on the overall functioning of a public institution. A vetting process may, for instance, result in the removal of a significant number of public employees or may focus, in particular, on senior employees in key management positions. A vetting process may even involve the disbandment of an institution and the establishment of a renewed institution. The potential negative effects of vetting on the institution and its environment, particularly the risks of governance gaps and increased criminality, need to be considered in the design of a vetting process itself, and other institutional reform measures may have to be considered alongside the vetting process to avoid or mitigate to the greatest extent possible these effects.

Second, other institutional reform measures could target the same public positions as a vetting process, and these different processes could *adversely impact* each other. In post-conflict or post-authoritarian settings, an entire public sector may have to be changed in order to meet the needs of states governed by the rule of law. Institutions might have to be merged or consolidated, reduced in size or enlarged, newly created or abolished. The personnel composition of an institution might have to be modified to reflect the composition of the population, and ex-combatants might have to be integrated. Such sectoral and institutional reforms determine the number of positions in a public institution, affect the job requirements for individual positions, and limit the number of posts available for persons from each gender, ethnic and religious group, or geographic region. Vetting processes that are not coordinated with such reforms may result in screening for posts that no longer exist or have different job requirements. Reform measures affecting positions that are also subject to vetting need to be carefully coordinated and sequenced with vetting processes in order to avoid adverse interactions between different institutional reform processes.

Third, other institutional reforms may help to *safeguard* a vetting process' outcomes. A vetting process will be of little use, for instance, if appointments continue to be made arbitrarily and if the outcomes of a vetting process can be reversed informally by executive decision. Reform measures that help to prevent the reversal of the outcomes of a vetting process include, in particu-

lar, efforts to establish merit-based recruitment, appointment and dismissal procedures, and other measures to stop political interference and to provide genuine separation of governmental powers.

Finally and critically, vetting as a stand-alone reform measure is generally insufficient to prevent the recurrence of abuse and has to be accompanied by other institutional reforms to *ensure the effectiveness* of the overall reform effort. More often than not, the shortcomings of public institutions in societies emerging from conflict or authoritarian rule are multifaceted and represent interrelated causes of malfunctioning and abuse. The multidimensional nature of the transitional reform challenge makes it generally necessary to complement vetting with other institutional reform measures and requires a holistic and coherent approach to institutional reform that may entail a complex, resource-intensive, and lengthy process.¹⁷

TWO TYPES OF VETTING, TWO APPROACHES TO INSTITUTIONAL REFORM¹⁸

The case studies in part 1 of this volume reveal that, in practice, the design of vetting varies considerably. Two basic types of vetting processes stand out, however, in transitional settings: review and (re)appointment. A discussion of these two types underscores the institutional character of transitional vetting, reveals how these two types of vetting are related to two distinct approaches to institutional reform in transitional settings, and provides further indications why vetting should be coordinated with or accompanied by other institutional reform measures.

Review and (re)appointment can be distinguished by the category of persons they primarily target: serving employees of a public institution or candidates for service in a public institution. I take a review process to refer to the screening of the first category because it implies examining the background of serving employees and the removal of those who are found unsuitable for public service because they have been involved in serious abuses.¹⁹ The screening of the second category can be described as a (re)appointment process because it involves examining the background of candidates for public service and the selection of those who are found most suitable. These may include both reappointed former public employees and newly appointed persons who did not hold a position in the public service.

More fundamentally, however, the two types of processes represent distinct approaches to reforming abusive institutions. The first approach represents the gradual *restructuring* of a continuously existing institution. The

abusive institution, with its employees, remains in place but is transformed by means of targeted reform interventions including vetting, which in this context takes the form of reviewing serving employees. The second approach to institutional reform involves the *disbandment* of the abusive institution and the establishment of a renewed institution. In this instance, vetting takes the form of screening candidates for appointment in public service.

Vetting in transitional settings is commonly understood in terms of a review process.²⁰ And, in fact, the most significant historical and recent examples of transitional vetting generally represent processes of “screen[ing] out” individuals who were involved in abuses.²¹ The terms describing many of these processes connote an understanding of removal from public service of unsuitable employees: denazification, purification, purging, lustration, decommunization, and de-Baathification.²² Most case studies in this volume describe various forms of review, including in Argentina, former East Germany, Greece, the Czech Republic, Hungary, Poland, police vetting in Bosnia and Herzegovina, and military vetting in El Salvador.²³ In the context of the United Nations, vetting is generally also understood in terms of a review process²⁴ and reflects, in particular, efforts in Latin America to remove human rights abusers from the security sector.²⁵

A review process aims to remove from public service those employees who were involved in serious abuses. Doing so fulfills a preventive function by helping to disable structures and networks within which these employees carried out the abuses. Removing abusers can also weaken sources of resistance to institutional reform and facilitate the implementation of other transitional justice measures. Moreover, replacing untrustworthy employees with new, more trustworthy ones can help to increase the legitimacy of an institution. Review as a measure of reforming abusive institutions can also help to provide recognition to victims of violence and state repression in that it acknowledges them as citizens with rights, duties, and legitimate needs. Finally, a review process can contribute to institutional reform in a different way. In addition to the presence of abusive public employees, the existence of incompetent employees is another recurring cause of the malfunctioning and lack of legitimacy of public institutions in transitional contexts. A review process can be used to replace not only abusive but also incompetent public employees, thereby making a further important contribution to effective reform.

However, the shortcomings of public institutions in societies emerging from conflict or authoritarian rule are often multifaceted, and transitional contexts are frequently marked by a fundamental crisis of trust in the public

sector. Although a review process can help to address some causes of malfunctioning and contribute to increasing the legitimacy of public institutions, it may not suffice to transform them into effective and actually trusted public bodies. A review process is limited in scope to replacing abusive and incompetent public employees. Broader, structural deficiencies, such as promoting minority or gender representation or decreasing the overall number of personnel, are difficult to achieve just by removing abusive or incompetent employees. In a review process, such broader concerns can be taken into consideration only within the scope of the appointment of replacements for removed employees or in separate reform activities. The Ad Hoc Commission in El Salvador, for instance, only vetted the military's officer corps, while broader changes were accomplished by a deep and comprehensive reform of the armed forces.²⁶ In former East Germany, vetting was just one part of a broader downsizing of the public sector.²⁷ Complementing a review process with other reforms will often be necessary to address such structural deficiencies. Moreover, changing public perceptions of and promoting trust in a public institution that was involved in serious abuses in the past may prove particularly difficult. In addition to actual structural reforms, verbal or symbolic measures that reaffirm a commitment to overcoming the legacy of abuse and an endorsement of democratic norms and values may help to build public trust in the institution.²⁸

When significant structural changes are necessary and the abusive institution is strongly distrusted, disbanding the institution and establishing a new one by (re)appointing all personnel represents a possible alternative to gradual restructuring through a review process.²⁹ The vetting of the police in El Salvador described in this volume offers an example of a (re)appointment process.³⁰ Disbandment and reestablishment generally provide an exceptional opportunity for general structural reforms that go beyond simply replacing individual personnel; in addition, the (re)appointment process itself allows for much broader personnel reforms, which are often necessary in transitional settings but difficult to achieve in a review process. In post-Dayton Bosnia and Herzegovina, for instance, efforts to promote minority representation in the police by means of the review process conducted by the United Nations were of limited success, and an additional, special program was needed.³¹ Considerable increases or reductions in personnel, or significant changes in the composition of personnel (which may be necessary to raise the representation of minorities or women or to implement significant organizational changes), can be achieved more easily when an institution is created *de novo* and its personnel is reestablished in a (re)appointment process.³² The (re)appointment of

judges and prosecutors implemented by the High Judicial and Prosecutorial Councils in Bosnia and Herzegovina was more successful in restoring an ethnic balance in the judiciary and the prosecutors' offices than the review of the police conducted by the United Nations.³³ (It should be noted that an insufficient number of qualified minority applicants and the resistance of minority candidates to return to their places of origin, however, caused delays in the appointments and resulted in a high percentage of reappointments of incumbent judges and prosecutors in Bosnia and Herzegovina. Changes in the composition of personnel by means of a (re)appointment process are limited by the availability of alternative candidates for recruitment.)³⁴

A (re)appointment process not only opens the way for broader reforms but may also provide a better opportunity than a review process to overcome the kind of deep crisis of trust in the public sector that is common in transitional situations. Disbanding the abusive institution, creating a new institution, and (re)appointing all personnel (of course, on the basis of merit and under transparent and fair conditions) send a strong signal of a clear break with the past and a commitment to norms and values, more so than does a review process. (Re)appointing all personnel changes more than just a few faces within the institution—it changes the face of the institution itself.³⁵

On the other hand, a (re)appointment process may create difficulties that can be avoided more easily in a review process. Disbanding institutions does not only risk increasing criminality, creating security problems, and destabilizing the transition by concurrently laying off a large number of public employees who may have the criminal know-how and the means to use force, who may have been involved in abuses in the past, and who may generally resist a transition that undermines their positions of power. Disbanding institutions can also create a governance gap if no effective provisions for alternative services are put in place and if replacements are scarce or take a long time to be identified. “De-Baathified” Iraq provides an example of both an increase in criminality and security gaps that resulted from the dissolution of the old army.³⁶ In contrast, the High Judicial and Prosecutorial Councils in Bosnia and Herzegovina circumvented a breakdown of the judicial and prosecutorial services by keeping serving judges and prosecutors in place until such time as a (re)appointment decision had been made that would either reconfirm the incumbents in their positions or replace them with other candidates.³⁷

A (re)appointment process also represents a more substantive and far-reaching intervention than a review process, one that can provide significant opportunities for political manipulation and arbitrary interference in the workings of otherwise independently operating governmental sectors.

A (re)appointment process should, therefore, be limited to circumstances in which the public institution is fundamentally dysfunctional and when the necessary reforms are unlikely to be accomplished without it, or only at significantly higher cost. A (re)appointment process should also make provisions to safeguard the separation of powers.³⁸ Particular care has to be taken to protect the independence of the judiciary. In general, vetting and (re)appointing judges should be carried out by an independent commission of their peers.

The differences between the two types of processes regarding the status of the persons undergoing vetting have considerable procedural consequences. In a review process, a serving employee risks being removed from public service or another curtailment of her employment rights such as suspension, transfer, denial of promotion, demotion, or early retirement. In the determination of this possible limitation of a right, the public employee should be afforded the fundamental procedural guarantees that apply to an administrative due process of law.³⁹ These include, in particular, initiation of proceedings within a reasonable time and generally in public; notification of the employee of the proceedings and the case against her; an opportunity for the person to prepare a defense, including access to relevant data; an opportunity for her to present arguments and evidence, and to respond to opposing arguments and evidence, before the vetting body; the opportunity of being represented by counsel; notification of the person of the decision and the reasons for the decision; and the right to appeal to a court or other independent body. An exception to this is that an employee who was unlawfully appointed can be removed without the need to further establish other reasons for her removal.⁴⁰

The procedural status of a candidate in a (re)appointment process is different. She does not risk removal or another infringement of an employment right but aims and hopes to be selected for public service. Access to public employment as such is not a right, and a candidate who challenges the fact that she has not been selected does not enjoy the due process protections that are granted to an employee who is removed from public service. (Re)appointment processes are, therefore, procedurally less complex than review processes. A candidate for public employment has, however, a right to “access, on general terms of equality, to public service.”⁴¹ Access to public service should, therefore, be based on criteria of equality, and the selection process should ensure equal application conditions and nondiscriminatory procedures. In case a candidate is not selected, she should have the opportunity to challenge the decision in court.⁴²

Review and (re)appointment processes also reveal broader procedural differences that may have considerable implications for the design of a vetting

process. Review processes require two screening steps of a different kind: not only do the serving employees need to be screened, but so do the potential candidates to replace those who were removed. The required double effort adds a layer of complexity and may place an additional burden on a review process in terms of kind and amount of resources needed, in particular when a large number of employees has to be replaced.⁴³ In a reappointment process, on the other hand, all candidates can be screened in one turn. However, the number of applicants in a (re)appointment process may be significantly larger, particularly if it involves a general, open competition for all posts.

The case studies in this volume show that review and (re)appointment represent distinct options of vetting in transitional settings. In the abstract, either option is possible and offers the distinct opportunities and risks that I have examined above. Choices about a type (and its variants) can only take place *in concreto*, weighing the opportunities and risks in their application to a specific context, and integrating vetting into a comprehensive institutional reform strategy.

INSTITUTIONAL REFORM BEYOND VETTING

A holistic and coherent approach to institutional reform in post-conflict or post-authoritarian settings will not only address shortcomings at the level of individual members of public institutions but will also look into structural deficiencies. Moreover, a holistic reform approach will situate the institution within its environment and possibly lead to changes in the institution's role and functioning, as well as in the institution's relationships with other actors. The choice of concrete reform measures will also significantly depend on the specific context, and there are considerable differences between post-conflict and post-authoritarian settings. The possible measures comprise a broad range of activities including the provision of training, the revision of laws, the development of regulations and operating procedures, as well as the reform of organizational structures, information systems, and management practices. This raises a range of complex issues that are discussed, in particular, in the literature on governance and security system reform.⁴⁴ In the remainder of this chapter, I aim to single out those measures of institutional reform that are generally critical, in addition to vetting, to address a legacy of abuse and to prevent its recurrence in societies emerging from conflict or authoritarian rule.

The most massive and systematic abuses are generally committed by agencies and groups that possess the means to exercise coercive force, that

is, armed forces, law enforcement and other security agencies, and unofficial, nonstatutory armed groups. An effective strategy to prevent abuse should, therefore, give priority to these agencies and groups. Unofficial armed groups will generally have to be disbanded, and their members will have to be demobilized or integrated into regular state institutions.⁴⁵ The reform of armed forces will focus, in particular, on disarming, demobilizing, and reintegrating surplus personnel into civilian life, demilitarizing the law enforcement sector, and limiting the role of armed forces to external defense functions.

Law enforcement agencies will maintain mandates to provide public safety that require the exercise of organized, coercive force including the powers to arrest, to detain, and to use deadly force.⁴⁶ They will remain the most direct and visible manifestation of state authority. The use of organized, coercive force by law enforcement agencies, the secret and clandestine nature of much of their work, and the vast opportunities for political interference result in high risks of adverse effects on basic standards and make these agencies particularly prone to abuse.⁴⁷ This is especially true in the fragile contexts of societies emerging from conflict or authoritarian rule, when abusive law enforcement agencies can subvert the rule of law and undermine the transition itself. The following sections focus, therefore, on the reform of law enforcement agencies.⁴⁸

Providing skills training to law enforcement personnel, supplying resources, and increasing organizational efficiency to overcome individual and organizational capacity deficits of law enforcement agencies is often the focus of international assistance to institutional reform in post-conflict or post-authoritarian settings. For instance, initial efforts to reform the police in Bosnia and Herzegovina after the signing in 1995 of the Dayton Peace Agreement concentrated on establishing a police academy; on providing basic and advanced training, as well as on-the-job training by placing international police officers alongside local officers; on restoring infrastructure; and on providing equipment, while comprehensive and fundamental institutional reforms lagged behind and moved ahead slowly. An effective vetting process started only in 1999 and many critical structural deficits were only addressed thereafter.⁴⁹ In general, however, capacity deficits such as lack of skills and equipment are not the only and often not even the most significant shortcomings of law enforcement agencies in post-conflict or post-authoritarian settings. In fact, abusive agencies are often remarkably “efficient” in using their skills and resources for abusive purposes. The Yugoslav police, for instance, was a founding member of Interpol, and the police forces in Bosnia and Herzegovina were arguably efficient in imposing “ethnic cleansing” during the

conflict of 1992–95.⁵⁰ An exclusive focus in the post-conflict or post-authoritarian period on strengthening the capacity of abusive law enforcement agencies carries the risk of assisting their members to continue their practices, and possibly even enabling “more efficient abuse.” Addressing a legacy of abuse should, therefore, not be limited to developing an agency’s capacities but must also deal with the means its members employ and the ends they pursue in the use of these capacities. This is what I call the integrity dimension of public service.⁵¹

In post-conflict or post-authoritarian settings, integrity-building reform measures will aim, at a minimum, to ensure that the members of a law enforcement agency refrain from committing serious abuses. Beyond this minimalist standard, integrity-building reforms will promote a public service that equitably responds to the needs of all citizens. Promoting the integrity of an abusive law enforcement agency may require a fundamental shift in the focus of its members: from serving the state, an authoritarian regime, or partisan interest groups to serving the citizens; from oppression, impunity, and arbitrariness to service, public accountability, and legality; and from provoking fear to responding to the public’s needs.

Building the integrity of a law enforcement agency also promotes its legitimacy and citizens will have more reason to trust an agency that is not abusive but responsive to their needs. Integrity-building reforms may, however, not be sufficient to overcome the fundamental crisis of trust that is characteristic of societies emerging from conflict or authoritarian rule.⁵² A legacy of massive and systematic abuse can continue to undermine the legitimacy of a law enforcement agency after conflict or authoritarian rule have come to an end as the citizens, particularly the victims of abuses, do not know if—and often have good reason to doubt that—the members of the agency truly share and abide by its basic norms and values. Post-conflict and post-authoritarian settings are, therefore, frequently characterized by a basic lack of trust in law enforcement agencies. As noted earlier, an agency that is not trusted will find it difficult to function effectively because it is unlikely to be relied upon by citizens who are not confident that the agency will provide for their needs and produce expected outcomes.

MEASURES TO BUILD INSTITUTIONAL INTEGRITY AND LEGITIMACY

In addition to integrity-building measures, specific legitimacy-building measures can help to overcome a fundamental crisis of trust and to transform

untrustworthy law enforcement agencies into trusted ones.⁵³ This section first describes integrity-building measures and then specific measures to build the legitimacy of law enforcement agencies.

Institutional reform measures that seek to build the integrity and legitimacy of law enforcement agencies can be divided into two groups: measures targeting individual members of an agency; and measures targeting institutional and sectoral structures. Each of the measures can contribute to (re)establishing the integrity and legitimacy of law enforcement agencies. None of these measures, however, is likely to restore on its own the integrity and legitimacy of an agency that carries the burden of a legacy of massive and systematic abuse. Individual reform measures contribute most effectively to restoring the integrity and legitimacy of an agency when they are constitutive elements of a coherent and, therefore, credible reform effort. Institutional reform will be even more credible and effective when it forms part of a comprehensive transitional justice policy.⁵⁴

REFORM MEASURES TARGETING INDIVIDUAL MEMBERS OF AN AGENCY

In addition to vetting and the exclusion of abusive employees, integrity-building reform efforts that target individual members of a law enforcement agency include, in particular, positive measures such as human rights training and other professional standards training. Such training aims at increasing the knowledge and understanding of professional standards in order to change attitudes and behavior on the basis of insight. In the recent past, the international community has made significant efforts to develop internationally-accepted professional standards, particularly in the judicial and law enforcement sectors. These include, among others, international and regional codes of conduct for law enforcement officials, principles on the independence of the judiciary, guidelines on the role of prosecutors, principles for the treatment of prisoners, principles on the use of firearms, and anticorruption standards.⁵⁵ In post-conflict and post-authoritarian settings, international governmental and nongovernmental organizations regularly invest significant efforts and resources in professional standards training for law enforcement and other security agencies. The UN High Commissioner for Human Rights, for instance, frequently conducts human rights and professional standards training in countries emerging from conflict or authoritarian rule.⁵⁶ Other international organizations active in this field include the UN High Commissioner for Refugees, the UN Development Program, the UN Children's Fund, the International Committee of the Red Cross, the Organization for Security

and Cooperation in Europe, the Council of Europe, and many other international and regional governmental and nongovernmental organizations.

The effects of training programs on actual conduct are difficult to assess and I am not aware of any comprehensive impact assessments of such training. Circumstantial evidence from post-conflict and post-authoritarian settings, however, raises doubts about the effectiveness of stand-alone training efforts in the absence of structural reforms.⁵⁷ Training without accompanying structural reforms may raise doubts both among the members of the law enforcement agency and among citizens about the sincerity of the reform effort. In societies emerging from conflict or authoritarian rule, environmental pressures, lack of alternatives, and habit are likely to provide greater incentives than training without structural reforms and to result in continued abuse. And citizens are unlikely to trust a reform effort that appeals to insight only but does not establish mechanisms to sanction abuse.⁵⁸

REFORM MEASURES TARGETING INSTITUTIONAL AND SECTORAL STRUCTURES

The absence of certain structural arrangements facilitates the commission of abuse. Political systems, for instance, that lack an effective separation of governmental powers are more open to partisan political interference by the executive with the judiciary or the law enforcement agencies. Situations of crisis such as conflict or authoritarian challenges to the political system frequently lead to the erosion of protective structures and abusive actors regularly benefit from their absence. Institutional and sectoral reforms in transitional settings will, therefore, aim to put in place structural arrangements that discourage or even prevent the commission of abuse. Four areas of structural reforms are generally critical to preventing the recurrence of abuse by law enforcement agencies in such settings: providing accountability; building independence; ensuring representation; and increasing responsiveness. Additional verbal or symbolic measures will further promote the legitimacy of law enforcement agencies in transitional settings.

ACCOUNTABILITY

Accountability means being answerable for one's actions.⁵⁹ Accountability mechanisms are vehicles of answerability. They provide checks to assess whether the actions of members of law enforcement agencies adhere to prescribed standards and they ensure sanctions for abusive conduct. Without accountability, the commission of abuses remains without consequences and

integrity matters little. The result is a climate of impunity that facilitates the commission of further abuses. A lack of accountability points to an insufficient commitment to integrity.

Establishing effective accountability mechanisms is particularly important for building the integrity and legitimacy of law enforcement agencies that have been involved in massive and systematic abuses in the past and experience a fundamental crisis of legitimacy. In general, accountability mechanisms for law enforcement agencies can oversee both the conduct of their members and their performance in providing public safety. Although it is generally important that the members of law enforcement agencies are accountable for both conduct and performance, building integrity and legitimacy requires, in particular, the establishment of effective accountability mechanisms to monitor the professional conduct of the members of law enforcement agencies and end impunity for serious abuses. Such mechanisms help not only to address past abuses but also to stop ongoing abuses and ensure that future abuses do not go unpunished.

Formal accountability mechanisms to monitor the conduct of the members of law enforcement agencies can be grouped in two levels:⁶⁰ internal accountability such as ethics codes, line supervision, and internal discipline; and external oversight such as ombudsperson services, legislative committees, civilian complaint review bodies, criminal liability, and civil liability.⁶¹ In addition to internal accountability and external oversight, census and identification processes — of the sort described below — are particularly relevant to establishing accountability and preventing the recurrence of abuse in societies emerging from conflict or authoritarian rule. Strictly speaking, census and identification constitutes not an accountability mechanism but a process that creates certain necessary conditions for accountability.

As a result of conflict, membership in law enforcement agencies with large numbers of personnel is often not clearly defined and the number of personnel is unknown. Frequently, the boundaries of such agencies are fluid and porous.⁶² Following authoritarian rule, information on membership in law enforcement agencies is often not accessible, there are different levels of affiliation with the agencies, and clandestine networks with their members and informal associates may continue to operate. Such circumstances promote a culture of impunity that facilitates the arbitrary and illegal exercise of law enforcement powers. A *census and identification* process clarifies the number of members of an agency, individually identifies them, and stops persons from informally joining and departing from law enforcement agencies. The census

consists in registering, in accordance with basic and commonly agreed-upon criteria of membership such as being included in a personnel list, all members of a law enforcement agency. During identification, each member is issued a personal identifier such as an identification card that recognizes the person as a member. The census and identification helps to determine the boundaries of a law enforcement agency, allows the state to (re)establish control over its agencies and their members, and permits citizens to identify who is authorized to exercise law enforcement powers and who is illegally impersonating a law enforcement official and should be sanctioned. Knowing, identifying, and being able to identify both the members of a law enforcement agency and persons illegally impersonating law enforcement personnel is critical to ending abuse and constitutes an important early step in establishing accountability and the rule of law. Census and identification processes also provide the basis for effective and efficient personnel management systems including recruitment, appointment, discipline, and dismissal procedures.⁶³

During conflict or authoritarian rule, not only are abuses committed but professional standards are frequently not clearly defined, processes to enforce them do not exist or are dysfunctional, and law enforcement power is exercised in a realm of arbitrariness and secrecy. *Internal accountability* mechanisms are aimed at addressing these deficiencies. Effective internal discipline mechanisms are systems within law enforcement agencies to monitor, investigate, and report on conduct of their members and sanction abuses in accordance with defined and known professional standards.⁶⁴ Such mechanisms help to build a common work ethic that disapproves of abusive practices. In post-conflict or post-authoritarian settings, it will frequently be necessary to revise rules and regulations and codes of conduct emphasizing the service nature of law enforcement; to improve information collection, management, and analysis systems to track officials with particularly high numbers of complaints; and to establish professional and well-resourced internal investigation bodies with accessible public complaint offices. In addition to discipline mechanisms, internal procedures to review the use of force and firearms are particularly important. Among the various functions of law enforcement, the use of coercive force and firearms carries the greatest risk of serious abuses. Formalized internal procedures will help to identify both misconduct and effective remedies.⁶⁵

Effective *external oversight* is another important accountability mechanism to prevent the recurrence of abuses by law enforcement agencies.⁶⁶ External oversight mechanisms for the law enforcement sector are not only important to ensure that basic standards are respected in the provision of security, they

also play a critical role in building the legitimacy of law enforcement agencies. Both the independence of external oversight from the agencies it monitors and the publicity of its operations increase public confidence in the effectiveness and fairness of accountability. The tasks of external oversight mechanisms vary and include review functions (monitoring, taking and investigating complaints, sanctioning abuses, identifying systemic root causes, and proposing remedies) and policy functions (overseeing, at the policy and strategic level, the functioning and operations of security agencies). External oversight bodies can have independent enforcement powers (investigations and discipline) or play supervisory and advisory roles (referral of complaints and oversight of investigations and discipline).⁶⁷ External oversight mechanisms of the security sector comprise independent civilian oversight bodies, legislative and executive oversight functions, and the prosecutors and the courts. External oversight bodies will be more effective and will avoid the risk of turning into another instrument of political interference if they are broadly legitimized, enjoy independence, and function with transparency.

Experience in security sector governance suggests that internal discipline and external oversight functions complement each other.⁶⁸ Internal discipline mechanisms alone run the risk of giving in to internal pressures and an inappropriate esprit de corps that is commonly found in law enforcement agencies, and may not enjoy citizens' trust. External oversight, on the other hand, can act more independently and put pressure on the agency it monitors but cannot substitute for effective internal accountability mechanisms, which have more direct access to information and can intervene more quickly and systematically. Multiple accountability mechanisms can complement each other and contribute to the effectiveness and credibility of oversight of the extraordinary powers of law enforcement agencies.⁶⁹

INDEPENDENCE

Although law enforcement agencies should be subject to legitimate and effective external oversight, they should not be exposed to inappropriate political interference by a government or be under the partisan political control of a particular faction. They should, instead, enjoy operational independence to effectively implement their mandates in accordance with legitimate laws. A careful balance must be struck between, on the one hand, legitimate review and policy-setting functions and, on the other hand, inappropriate case-based interference. Not only the judiciary should enjoy independence; law enforcement bodies should also be free from partisan interference. In post-conflict or post-authoritarian settings, limiting political appointments and

establishing merit-based appointment procedures, in conjunction with vetting processes, are generally of particular importance for building the operational independence of law enforcement agencies. Parties to a conflict or authoritarian regimes generally ensure their control over the law enforcement sector by assuming broad powers to appoint and dismiss the members of law enforcement agencies at all levels. As a result, law enforcement officials fill positions not because they are competent but because the ruler, regime, or a faction wills it so, creating dependencies that are likely to result in unprofessional and abusive conduct. Vetting processes combined with the establishment of merit-based appointment procedures not only promote the competence of the members of law enforcement agencies but also significantly enhance their independence and that of the entire agency. Creating merit-based appointment procedures also constitutes a condition for the sustainability of a vetting process, ensuring that its outcomes are not arbitrarily reversed.

Specific measures may be necessary to guarantee the operational independence of those holding leadership positions in a law enforcement agency. Political interference is often ensured by appointing nonprofessional faction loyalists or party members to leadership positions in law enforcement agencies. Various models exist to promote the independence of these positions. Efforts focus, in particular, on requiring professional qualifications for leadership appointments and on entrusting external, nonexecutive bodies with appointment powers. The recently established Police Service Commission in Nigeria, for instance, is responsible for the appointment and promotion of all members of the Nigerian police except for the inspector general.⁷⁰ The creation of police commissioner posts in Bosnia and Herzegovina provides another example. These posts were created to deter inappropriate interference by any politically appointed ministers of interior. A police commissioner is appointed by an independent board and is responsible for the management and operations of police service.⁷¹

REPRESENTATION

Conflict or authoritarian rule frequently leads to the domination and exploitation of law enforcement agencies by one particular group or segment of society. Such groups can be ethnic, geographical, religious, and factional, among others. The general underrepresentation of women in law enforcement agencies is often worse in post-conflict or post-authoritarian settings. Domination by a group, particularly in law enforcement agencies, frequently results in discriminatory practices, abusive conduct, and misuse of public resources, and undermines the legitimacy of a law enforcement agency.⁷² In societies emerg-

ing from conflict or authoritarian rule, terminating group domination helps to establish basic internal checks and balances. In addition, representative composition teaches members of the agency to respect colleagues from other groups and, through them, the diverse groups of society. Representation also helps the members of the agency to better understand the needs of the society they are mandated to serve and to overcome discriminatory practices. Moreover, representation is a critical factor in increasing the trustworthiness of a law enforcement agency.⁷³

RESPONSIVENESS

Law enforcement agencies that pursue the special interests of a regime or a partisan group are prone to ignore the interests of the citizens and risk turning into instruments of oppression and abuse. As a priority, transitional reform should seek to transform law enforcement agencies from serving the state, an authoritarian regime, or partisan interest groups to serving all citizens and being responsive to their needs without discrimination.⁷⁴ Accountability, independence, and adequate representation all play a part in building a responsive law enforcement service. In addition, an array of measures that can be grouped under the rubric of promoting community policing specifically contributes to developing the responsiveness of a law enforcement agency. Community policing refers, in particular, to efforts by law enforcement agencies to enter into direct contact with the citizens they are mandated to serve, to understand their needs and address their problems, and to adopt a preventive, problem-solving approach to policing.⁷⁵ In states with broadly legitimate and effective law enforcement agencies, most of the work of these agencies is instigated by requests from citizens rather than by demands from government or being self-initiated.⁷⁶

Promoting responsiveness also plays an important role in building the trustworthiness of law enforcement agencies, in particular in societies emerging from conflict or authoritarian rule that have experienced oppression and abuse by these agencies and have learned to distrust them. Building direct contacts with citizens and becoming responsive to their needs will go a long way in changing public perceptions about these agencies. Listening to the needs and concerns of citizens in the design of the reform process itself will further promote public trust.

LEGITIMACY

The integrity-building measures described so far all serve to promote the legitimacy of law enforcement agencies.⁷⁷ Agents who act with more

integrity as a result of professional standards training are more likely to earn the trust of citizens. Effective accountability mechanisms that provide answerability in a transparent and credible manner and sanction abuses will help to reassure citizens that those who operate the law enforcement agency know and abide by these standards. Promoting the separation of powers and merit-based appointment procedures will help restore confidence in the impartiality and reliability of law enforcement agencies. Agencies that include among their members representatives from the various groups of society are more likely to be trusted and used by these groups. And the public perceptions of law enforcement agencies that cultivate community relations and respond to citizens' needs will improve.

In post-conflict or post-authoritarian settings, these integrity-building measures may, however, not be sufficient to restore civic trust, particularly of victims, in law enforcement agencies that were involved in massive and systematic abuses. Societies emerging from conflict or authoritarian rule are frequently marked by a fundamental crisis of civic trust; specific and targeted legitimacy-building measures might therefore be necessary—in addition to integrity building—to overcome this crisis and help transform untrustworthy agencies into trusted ones. Such measures include, for instance, apologies by representatives of agencies that were involved in massive and systemic abuses;⁷⁸ memorials, commemorative days, and museums to remember victims of abuses and acknowledge the role of specific agencies in those abuses; the renaming of streets and public places that bear the names of officials or agencies with histories of abuse; the changing of coats of arms, insignia, and uniforms that are associated with an abusive past; and agency-based truth-seeking efforts. These targeted legitimacy-building measures *verbally or symbolically reaffirm* a commitment to overcome the legacy of abuse and an endorsement of democratic norms and values.⁷⁹ Unlike integrity-building measures, these do not aim to change conduct (and thereby build civic trust) by providing training or to develop structures that discourage abuse. These measures do not “promote trust through action” but by reaffirming norms.⁸⁰ They do so by acknowledging past abuses, by expressing a turning away from an abusive past, and by affirming a commitment to norms.

These specific legitimacy-building measures can of course not replace integrity-building reforms that require actual behavioral or structural changes. Stand-alone verbal or symbolic reaffirmations of norms that are not accompanied by actions to give effect to these norms also lack credibility. Such “empty promises” are unlikely to convince citizens to trust law enforcement agencies. Nonetheless, reaffirmations may usefully complement

integrity-building reforms which by themselves may be insufficient to build trust in agencies that were involved in massive and systematic abuses. Such acknowledgements of past abuses and expressions of commitment to norms may help to convince citizens, particularly the victims of abuses, of the sincerity of the reform efforts, and to move them from distrusting to trusting a law enforcement agency.

MEASURES TO EMPOWER CITIZENS

The primary targets of transitional reform are abusive public institutions. Principal responsibility to transform abusive institutions and to prevent the recurrence of abuses rests with the representatives of these institutions and those overseeing them. Citizens, particularly the victims of abuses, are not responsible for institutional reform and should not be burdened with it. And yet, in the exercise of their mandates, public institutions relate to citizens, whose role also changes in the course of the transitional reform process. No longer are they mere subjects of state oppression or victims of conflict-related violence; instead they truly become citizens with rights, responsibilities, and needs that public institutions are called to serve. In transitional contexts, the process of recognizing the victims of past abuses truly as rights-bearing citizens occurs mostly by reforming abusive institutions, as well as by providing other transitional justice measures.⁸¹ At the same time, however, the former victims of violence and subjects of state oppression begin to *recognize themselves and be recognized* in this transformation process as citizens with rights and duties and legitimate needs. And they can be empowered to do so. Efforts to empower citizens include, for instance: public information campaigns to inform citizens about their rights and duties in their relationship with law enforcement agencies and other public institutions;⁸² conducting surveys to assess public security needs and give former victims and citizens in general a voice in the reform process; informing the media about the role and functions of law enforcement agencies to enable journalists to report and knowledgeably comment on the work of these agencies; training civil society organizations in monitoring law enforcement agencies and in reporting abuses; informing and training civil society organizations, and citizens generally, about accountability mechanisms and how to effectively use them; establishing legal aid offices; assisting citizens in accessing law enforcement agencies and representing their needs; and others. Such efforts not only empower citizens but also impact, in turn, the institutional reform process: empowering citizens further clarifies the role of law enforcement agencies and helps to

build a relationship in which both sides recognize each other in their legitimate roles.

NORMATIVE CRITERIA AND CONTEXTUAL CONDITIONS

The preceding discussion reveals that, as a measure of institutional reform, vetting needs to be adapted to the reform needs of a specific transitional situation, complemented by other reform measures, and integrated in a coherent institutional reform strategy. In this concluding section, I identify several normative criteria and contextual conditions that should be considered in the design of a vetting process and, to a large extent, also of other transitional reform processes. *Normative* criteria refer, in particular, to the aims of transitional vetting and the basic legal standards relevant to the practice of vetting. *Contextual* conditions relate, in particular, to opportunities, risks, reform needs, resource requirements, and sustainability considerations. The normative criteria provide a framework to guide the design of a vetting process in response to the requisites of given contextual conditions.

Pablo de Greiff in this volume elaborates in detail on the plausible aims of transitional vetting and emphasizes that vetting can pursue plural ends. Among others, vetting can have punitive and preventive functions; it can facilitate other transitional processes; it can promote civic trust; and it can help provide recognition to victims of violence and repression. However, as I have argued above, whatever aims are pursued by transitional vetting, its defining functions—be they preventive, enabling, trust-inducing, or providing for recognition—all relate to an effort to reform abusive institutions. A purely individual-punitive explanation of transitional vetting, for instance, remains unsatisfactory.

Understanding transitional vetting as a measure to reform abusive institutions provides a normative dimension that can help to guide the design of a vetting process at three distinct levels. First, the design should aim to ensure that the vetting process itself contributes, to the greatest extent possible, to the envisaged institutional reform goals. I elaborated above on the specific opportunities and risks of review and (re)appointment, and how they can contribute in different ways to the institutional reform functions of a vetting process. For instance, a (re)appointment rather than a review process may provide a better way to reform a largely dysfunctional and severely abusive public institution in order to build civic trust and provide recognition to victims. Second, the vetting process needs to be incorporated in a comprehensive institutional

reform framework and coordinated with other institutional reform activities to achieve the desired reform goals because the deficiencies of a public institution in transitional settings are usually multifaceted.⁸³ For instance, conducting a vetting process for an institution that is exposed to heavy political interference may not significantly contribute to building civic trust if it is not accompanied by an effort to shield the institution from such interference, establish merit-based appointment procedures, and institute effective democratic oversight.⁸⁴ And, third, since vetting shares its institutional reform-related aims, particularly providing recognition and building civic trust, with other transitional justice measures such as criminal prosecutions, truth seeking, and reparation programs,⁸⁵ coordinating and relating vetting with these other measures can help to achieve these aims more fully and, therefore, also contribute to the effectiveness of the vetting process itself. For instance, combining the removal from a public institution of abusive employees with their criminal prosecution and with reparative measures to the benefit of the victims of these abuses stands a better chance to build civic trust in the institution than a stand-alone vetting measure.

Basic legal standards relevant to the practice of vetting are a fundamental expression of the rule of law and can also affect design choices. They include, in particular, the principle of individual responsibility,⁸⁶ due process guarantees,⁸⁷ and guarantees relating to the right to access, on general terms of equality, to public service.⁸⁸ Purges and large-scale dismissals on the basis of mere affiliation with a group, for instance, contravene the principle of individual responsibility and are likely to be discriminatory. As I elaborated above, different legal standards apply in review and (re)appointment processes. The applicable standards also vary according to the category of institution targeted. In particular, designing a vetting process for judges should respect standards related to the independence of the judiciary. Security personnel, on the other hand, enjoy limited protections and can be more easily removed from their positions. Institutional differentiation is therefore called for in the design of a vetting process.⁸⁹

These normative criteria provide a useful albeit broad guide in the design of a vetting process. The contextual conditions in a concrete, historical situation further determine the design strategy. A vetting process needs to achieve its aims *in the context of a specific, transitional society* and therefore adapt to its conditions. These conditions broadly include the opportunities for and risks of a vetting process, the reform needs, resource requirements, and sustainability considerations.

Opportunities for transitional vetting depend largely on actual government authority, political will, a vetting mandate, and the timing of a vetting process. *Actual government authority* and control over the institutions to be vetted is a condition to put in place a vetting process. Post-conflict contexts are, however, often marked by a relative absence or division of government authority.⁹⁰ Peace agreements that end internal armed conflicts frequently provide for complex power-sharing arrangements between former warring factions. Transitional governments that are established to administer the country until the organization of national elections regularly reflect a delicate balance of power between former warring factions. Such governments lack broad public legitimacy and, frequently, their mandate to govern is limited both legally and in actuality. In addition, former warring factions may continue to exercise actual control over significant parts of the country's territory. The establishment of a vetting process may have to wait until actual government authority has been established, for instance following the formation of an elected and broadly legitimized government.

Establishing a vetting process requires not only actual government authority but also *political will*. Transitional contexts are often politically contested. Former rulers or warring factions frequently hold on to power in the post-conflict or post-authoritarian context but have little interest in supporting the transitional agenda. Rather, they will often aim to maintain the status quo and hold on to the gains they made during the conflict or the authoritarian rule. Public employees who risk losing power through a vetting process are likely to resist it being established and to obstruct its implementation. Reform-minded constituencies may not have the upper hand in these environments and may have to tread carefully to avoid a resumption of conflict or authoritarian rule. The political will may not—yet or ever—be sufficient to put in place a vetting process. The establishment of a vetting process can, however, be significantly facilitated by an explicit and clear *mandate*. A specific reference to vetting in a peace agreement or a Security Council resolution, for instance, will be more difficult to circumvent and help to overcome political resistance.⁹¹ Should there be enough political will to establish a vetting process, the level of will can still significantly impact the actual design of the process. Softer vetting options—such as merely screening new appointments or promotions, or limiting the number of institutions or positions to be covered by the process—may, for instance, be more acceptable in environments where individuals involved in serious abuses in the past continue to hold positions of power in government or even in the institutions to be vetted.

On the other hand, removing such “spoilers” may also constitute a “quick win” that can be important not only to build momentum for the vetting process itself and the broader institutional reform process, but also to facilitate the implementation of other transitional justice measures and to advance the overall transition.⁹² At the same time, the demands of other transitional processes, such as a politically challenging and resource-intensive electoral process, could draw away resources and political attention from a vetting process; might pursue different ends such as broad political inclusion; or result in a change of responsible actors such as a new government. The implications of *timing* raise complex questions of sequencing and interrelations with other transitional processes, and the process has to be adapted to political developments. The timing will condition strategic design choices such as the institution or group targeted by a vetting process, the type of mechanism selected, or the composition of a vetting body. Timing considerations, therefore, need to be carefully considered in designing a vetting process.

Several risks of transitional vetting, in particular governance gaps and an increase in criminality, have already been alluded to above and do not need to be further discussed here. But there is also the danger of *political misuse* of transitional vetting. A vetting process could be misused, for instance, to get rid of independent judges or political opponents, in particular when removals are based on some form of group affiliation and the process degenerates into a political purge. In fact, a recurring response in post-conflict or post-authoritarian settings to the presence of undesirable elements in the public service has been and continues to be variants of what can be labeled purges that do not fall within the definition of vetting generally used in this volume.⁹³ Such measures do not do justice to those affected by the process and can be expected to create resentment among them. Purges are unlikely to be perceived as fair and their contribution to building civic trust is likely to be limited, in particular among those associated with persons undergoing the process. The indiscriminate nature of purges also makes it difficult to integrate them into an institutional reform process that needs to be carefully calibrated to achieve its objectives.⁹⁴ The danger of political misuse can be largely averted by a respect for relevant legal standards in the design of vetting processes.

The *reform needs* represent additional contextual conditions that need to be considered in the design of a vetting process. The nature of the conflict or authoritarian past and the general level of economic and political development of the country in question will affect the kind and seriousness of the abusive behavior to be scrutinized; the number, sort, and position of

persons involved in the abuse; the kind and number of institutions to be vetted; the pool of potential replacements; and the prevalence of other institutional defects that need to be reformed. The case studies in this volume reveal, for instance, that the challenges for vetting in the former communist countries in Central and Eastern Europe were significantly different from the challenges in the Latin American transitions. The former countries had to deal with a large number of public employees and collaborators who were generally involved in relatively low levels of abuse that were recorded in detail in secret police archives, whereas the situation in the latter countries was marked by a limited number of officials who were involved in serious and massive abuses but who did not keep detailed records of their acts.⁹⁵ Vetting efforts in Latin America could, therefore, concentrate on relatively small numbers of perpetrators but had to rely significantly on documentation provided by nongovernmental organization, whereas Central and Eastern European lustration efforts had to manage huge amounts of existing information and had to process large numbers of cases. The former Yugoslavia emerged not only from serious armed conflict but also from communist rule; the duality of that transition presented a set of peculiar challenges that also affected the design of the vetting processes that took place. For instance, difficult decisions had to be made about the period and type of abuse to be covered by a vetting process. These contexts differ again drastically from the more recent post-conflict transitions in sub-Saharan Africa that are characterized by an absence of functional state institutions, a high number of not only public employees but also unofficial armed groups who committed acts of serious violence, and a significant involvement of the international community in the peace settlement and the immediate post-conflict period.⁹⁶ Among others, vetting processes in these contexts involve, therefore, tremendous efforts in collecting relevant background information and international actors repeatedly play an important role in these processes.

The reform needs also determine what other reform measures are necessary and how vetting should be incorporated in a broader framework of institutional reform to comprehensively address the multifaceted shortcomings of an institution in a post-conflict or post-authoritarian setting and to ensure sustainability of the vetting process by parallel, supporting reform measures. Different contexts raise different reform needs and significantly different requirements for the design of vetting processes.

The success or failure of vetting processes also depends significantly on the provision of adequate *resources*. Capacities are generally limited in transitional

contexts, various reform projects compete for the same scarce resources, and the requirements of transitional vetting are usually underestimated. Vetting processes are generally complex, time-consuming, and resource-intensive exercises requiring multidisciplinary skills, in particular when they concern institutions with large numbers of employees. The specific resource needs of a certain vetting process depend, however, largely on the transitional contexts and the concrete reform needs, and vary between different variants of vetting. Significant factors that determine the resource needs include the number of cases to be processed (including the job applications to be expected), the infrastructure of the country in question, the availability of background information on the persons to be vetted, the quality of this information, and its verifiability. Again, different contexts raise different challenges. Post-conflict contexts are often characterized by high levels of uncertainty, a breakdown of record and information management systems, and a collapse of the general infrastructure. As a result, reliable information about the persons to be vetted is often scarce and difficult to obtain.⁹⁷ Certain authoritarian regimes, on the other hand, leave behind large archives with files of questionable reliability that need to be processed and verified.⁹⁸ If the resources required for a certain vetting process are not available, its implementation has to be postponed or phased, or its design has to be adapted to limit the resource needs. For instance, a less ambitious vetting process could just target the senior staff of an institution, and all other cases may be passed on to the regular disciplinary mechanism.

A final consideration about the design of a vetting process concerns its *sustainability*. As a transitional measure, vetting is usually a one-off exercise that responds to the exceptional challenges and circumstances of a society in transition. Ensuring the sustainability of vetting also requires, therefore, a transfer of outcomes and capacities to relevant permanent state structures. For instance, decisions made during the vetting process should be recorded by the personnel management system of the institution; vetting documents should be integrated into the personnel files; and acquired know-how should be transferred. Ensuring a seamless transfer of information and capacities from the exceptional, one-off transitional mechanism to regular and permanent structures should be considered during the design of the vetting process. In particular, its regulations, procedures, and systems should be compatible with relevant permanent structures. The transformation of an exceptional vetting mechanism into a regular appointment and disciplinary body might also be considered.⁹⁹

CONCLUSION

In this chapter, I argue that vetting is best understood as a measure to reform abusive institutions. The discussion about review and (re)appointment processes not only highlights the institutional dimension of vetting but also shows that it is generally an insufficient measure to reforming law enforcement agencies that were involved in massive and systematic abuses in the past. In addition to vetting, efforts to prevent the recurrence of abuse in post-conflict or post-authoritarian settings need to focus, in particular, on integrity-building structural reforms that discourage abuses and increase the responsiveness of law enforcement agencies; legitimacy-building measures that verbally or symbolically reaffirm a commitment to overcome the legacy of abuse and an endorsement of democratic norms and values; and efforts to empower the subjects of state oppression and victims of conflict-related violence that help them to recognize themselves and be recognized as rights-bearing citizens.

Each of these measures can make a significant contribution to prevent the recurrence of abuse. None of the measures on its own, however, is likely to achieve the hoped-for transitional transformation and different reform elements depend on each other. A legacy of massive and systematic abuse often leads to a deep institutional crisis that calls not only for a holistic but also a tailor-made approach to transitional reform if it is to be effective and sustainable. Although certain normative criteria can guide design choices, there is significant flexibility regarding the specific form of an institutional reform process and its design should be adapted to the conditions of a particular transitional context. Frequently, vetting will constitute an important element of a coherent transitional reform strategy and individuals involved in serious abuses should generally be excluded from public service. The practice of vetting shows, however, a significant rate of failure that is the result of both normative misconceptions and operational miscalculations. Great care is necessary in the design of a vetting process to integrate it in a coherent reform strategy and to minimize the risk of failure. Not engaging in a process that is likely to result in deeply flawed outcomes and is unlikely to build more trustworthy public institutions should not be dismissed *a priori* as a possible course of action.

NOTES

My sincere gratitude to Pablo de Greiff and Roger Duthie, who commented on earlier drafts of this chapter.

- 1 See my chapter on Bosnia and Herzegovina in this volume. See also International Crisis Group, "War Crimes in Bosnia's Republika Srpska: Who Are the People in Your Neighborhood?" *Balkans Report* No. 103 (November 2, 2000): 2, 80–82, <http://www.crisisweb.org>.
- 2 One way of providing justice in response to massive and systematic abuse is to prevent its recurrence. See Louis Joinet, *Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report*, E/CN.4/Sub.2/1997/20/Rev.1, 10 (noting that states need to take measures "in order to avoid victims having to endure new violations affecting their dignity"). For a discussion on vetting and transitional justice, see chapter by de Greiff in this volume.
- 3 See, e.g., *Concluding Observations of the Human Rights Committee: Bolivia, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, CCPR/C/79/Add. 74 (1997), para. 15. The committee has made such statements also, among others, regarding Argentina, Brazil, Chile, Colombia, Guatemala, Haiti, Paraguay, and Serbia and Montenegro.
- 4 "Velásquez Rodríguez Case," Inter-Am. Ct. H.R. 35, OAS/ser. L/V/III. 19, doc. 13, app. VI (1988): 174–75.
- 5 Joinet, *Question*, 10, 28–29.
- 6 Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity. Addendum*, UN Doc. E/CN.4/2005/102/Add.1, 18.
- 7 United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. Report of the Secretary-General*, UN Doc. S/2004/616, 17–18; emphasis added.
- 8 Gregory L. Naarden, "Non-Prosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials," *American Journal of International Law* 97 (2003): 342–52; Stephen R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, 2nd. ed. (Oxford: Oxford University Press, 2001), 156; and Neil J. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights," *Law and Contemporary Problems* 59, no. 4 (Autumn 1996): 138.
- 9 In his chapter in this volume, de Greiff describes how transitional justice measures provide recognition to victims not only as victims but as rights bearers and citizens.
- 10 The impunity gap is a recurring phenomenon in transitional settings where a large number of persons were involved in committing serious abuses but not everyone can

- be prosecuted. See Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-conflict States. Prosecution Initiatives* (New York and Geneva: United Nations, 2006), 7–10.
- 11 *Concluding Observations of the Human Rights Committee: Guatemala, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant*, CCPR/CO/72/GTM (2001), para. 13 (noting that “[t]he perpetrators must be tried and punished; mere separation from service or dismissal from the army is not sufficient”).
 - 12 Juan E. Méndez and Javier Mariezcurrena, “Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection,” *Social Justice* 26, no. 4 (1999): 98–101.
 - 13 For a discussion of how different transitional justice initiatives promote civic trust, see Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006).
 - 14 See chapter by de Greiff in this volume.
 - 15 Herman Schwartz, “Lustration in Eastern Europe,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 2, ed. Neil J. Kritz (Washington, DC: US Institute of Peace Press, 1995), 477–78. See also the Central Europe case studies in this volume.
 - 16 Although the argument that vetting helps to disable abusive structures appears plausible, empirical research has not been done to demonstrate not just that it is plausible, but that it obtains, in fact.
 - 17 See my chapter on Bosnia and Herzegovina in this volume.
 - 18 I am grateful to William G. O’Neill for a research paper on review and reappointment processes that provides the basis for this section.
 - 19 Conversely, individual employees who are not found unsuitable in a review process remain employed.
 - 20 In established rule of law contexts, on the other hand, vetting ordinarily refers to a process of screening *candidates* for sensitive public positions to exclude individuals who represent a threat to state security or carry an increased risk of abuse of power. See, for instance, Geneva Center for the Democratic Control of Armed Forces, *Vetting and the Security Sector* (Geneva: DCAF Backgrounder Series, 2006).
 - 21 United Nations Security Council, *The Rule of Law and Transitional Justice*, 17.
 - 22 On the definition of basic terms in the context of vetting, see the introduction by Duthie in this volume. Nevertheless, lustration processes generally not only involve the review of serving public employees but also the screening of candidates for public employment, including replacements of removed employees. See, for instance, chapter by Priban in this volume.
 - 23 See the respective chapters in the first part of this volume. Needless to say, the review processes described encompass a broad variety of forms. In the case of Greece, for instance, regular disciplinary procedures were used rather than a special vetting mech-

- anism; see chapter by Sotiropoulos in this volume. The case of Poland provides another variant where persons were not removed for past acts but for a false declaration about their past conduct; see chapter by Czarnota in this volume.
- 24 Orentlicher, Report, 18 (stating that “[p]ublic officials and employees responsible for gross violations of human rights...shall not continue to serve in State institutions” [emphasis added]); the United Nations Secretary-General, however, also makes reference to vetting new candidates (United Nations Security Council, *The Rule of Law and Transitional Justice*, 18).
 - 25 See, in particular, Inter-American Court, *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. 35, OAS/ser. L/V/III. 19, doc. 13, app. VI (1988), 174–75; and Human Rights Committee, *Concluding Observations: Argentina, Consideration of Reports Submitted by State Parties under Article 40 of the Covenant*, CCPR/CO/70/ARG (2000), para. 9. See also Méndez and Mariezcurrena, “Accountability for Past Human Rights Violations,” 98–101.
 - 26 See chapter by Zamora in this volume.
 - 27 See chapter by Wilke in this volume.
 - 28 See Pablo de Greiff, “The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted,” in *The Age of Apology*, ed. Mark Gibney and Rhoda E. Howard-Hassmann (Philadelphia: University of Pennsylvania Press, forthcoming).
 - 29 Screening candidates for promotion and screening candidates for vacant positions only without disbandment and new establishment of the public institution represent “soft” options of a (re)appointment process. The procedural status of a candidate for promotion compares to the status of a candidate for a public service position. But these soft options do not provide the opportunities for broader institutional reform of a (re)appointment process. On an informal process of screening promotions, see chapter by Barbuto in this volume.
 - 30 See chapter by Zamora in this volume.
 - 31 United Nations Security Council, *Report of the Secretary-General on the United Nations Mission in Bosnia and Herzegovina*, UN Doc. S/2002/1314, 4–5. See also my chapter on Bosnia and Herzegovina in this volume.
 - 32 Obviously, other institutional structures could remain in place while the personnel of an institution is reestablished in a (re)appointment process. The appropriate level of institutional disbandment depends on the level of reform needs.
 - 33 See my chapter on Bosnia and Herzegovina in this volume. Other causes may, however, also have contributed to the more effective reforms of the judiciary including a significantly smaller number of positions targeted by the process, lower political stakes than in the reform of the police, and more international pressure.
 - 34 Evidently, this limitation also applies when candidates need to be identified to replace abusive or incompetent employees in a review process.

- 35 This effect is of course diminished by reappointments of old faces and could be subverted by an undeserved reinsertion of all old faces, including the untrustworthy ones or those appearing to be untrustworthy. However, this possibility does not provide an argument against the potential benefits of a (re)appointment process but against its misuse.
- 36 Governance problems also resulted, however, following the removal of senior members of the Baath Party from their government posts. But these removals were the result of a process that may be closer to a purge than a review process that implies individualized criteria and proceedings. On de-Baathification and its negative side effects, see Jens Meierhenrich, "The Ethics of Lustration," *Ethics and International Affairs* 20, no. 1 (Spring 2006): 110–19.
- 37 See my chapter Bosnia and Herzegovina in this volume.
- 38 United Nations General Assembly, *Strengthening the rule of law: Report of the Secretary-General*, A/49/512 (October 14, 1994), 5 (noting that the protection of human rights under the rule of law requires a strong constitution, which, inter alia, "[d]efines and limits the powers of government and its various branches, vis-à-vis each other, and the people"). See also chapter by Andreu-Guzmán in this volume.
- 39 Article 14 of the International Covenant on Civil and Political Rights. The European Court of Human Rights holds, however, that the due process protections of the European Convention generally do not apply to disputes between public officials and the state because such disputes do not address a right of a "civil" nature. Public officials who are subject to a review process in the European context may, therefore, not be protected by the due process guarantees of the convention. For a detailed discussion on the different views on the applicability of due process guarantees in review processes, see chapter by Andreu-Guzmán in this volume.
- 40 Orentlicher, *Report*, 16, 20. For more details on minimum due process guarantees in review processes, see chapter by Andreu-Guzmán in this volume, and United Nations Security Council, *Rule of Law and Transitional Justice*, 17.
- 41 Article 25 of the International Covenant on Civil and Political Rights.
- 42 For more details on the rights of candidates applying for a public employment positions, see also chapter by Andreu-Guzmán in this volume.
- 43 In fact, the focus of review processes is generally on the removal of abusive or incompetent employees, whereas the need to find suitable—if not the most qualified—replacements does not receive sufficient attention. Making the institution more trustworthy and effective also requires, however, the identification and selection of competent and representative replacements with integrity.
- 44 See, for example, Organization for Economic Co-operation and Development (OECD), *Security System Reform and Governance. A DAC Reference Document* (Paris: OECD Publish-

- ing, 2005); and Alan Bryden and Heiner Haenggi, eds., *Challenges of Security Sector Governance* (Muenster: LIT Verlag, 2003).
- 45 Orentlicher, *Report*, 19. A number of authors recently observed that strategies to reform the security sector remain too state-centric and that successful interventions need also to encompass and reform nonstate and informal security structures. See, for example, UK Department for International Development (DFID), “Non-state Justice and Security Systems,” DFID Briefing PD Info. 018 (2004); and Louise Andersen, “Security Sector Reform in Fragile States,” Danish Institute for International Studies Working Paper 2006/15. In this chapter, I focus on state institutions and cannot discuss the role of non-state actors in the provision of (in)security.
- 46 I use the term “law enforcement official” as defined in the UN *Code of Conduct for Law Enforcement Officials*: “The term ‘law enforcement officials’, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.” This includes not only the police but all agencies with law enforcement powers, irrespective of the names they use. See United Nations, *Code of Conduct for Law Enforcement Officials*, A/RES/34/169 (1979), article 1(a).
- 47 United Nations, *Code of Conduct for Law Enforcement Officials*, preamble (noting that “the nature of the functions of law enforcement in the defence of public order and the manner in which those functions are exercised have a direct impact on the quality of life of individuals as well as of society as a whole” and stressing “the potential for abuse which the exercise of such duties entails”). See also Anthony Altbecker, “Review of the OSF-SA/Justice Initiative Programme: Civil Society Oversight Over the Police in South Africa,” in *Strengthening Police Oversight in South Africa* (Newlands: Open Society Foundation for South Africa, 2005), 36. Experience generally indicates that there are more complaints of abuses by law enforcement agencies than by other public institutions, and that law enforcement agencies commit a higher number of serious abuses than other public institutions.
- 48 Many of the principles and reform measures described apply, however, to the public sector in general.
- 49 In his 2002 final report on the UN Mission, the Secretary-General notes that by 1999, it “was evident that sustainable police reform and restructuring could not be tackled through training and intensive co-location alone.” *Report of the Secretary-General on the United Nations Mission in Bosnia and Herzegovina*, S/2002/1314 (December 2, 2002), 3. It should be noted, however, that the conditions for police reform were extremely challenging in the immediate post-conflict period. Although Annex 11 of the 1995 Dayton Peace Agreement foresaw the reform of all law enforcement agencies and designated a UN police task force to assist in that, the complex constitutional framework established in the peace agreement, domestic resistance to reform, a weak international mandate,

and limited international resources represented almost insurmountable obstacles to basic structural reforms. It was only in 2004 that a mixed domestic-international Police Restructuring Commission was established that began to address a number of fundamental structural deficits.

- 50 See my chapter on Bosnia and Herzegovina in this volume.
- 51 It goes without saying that, conversely, building integrity without ensuring capacity is also insufficient. Integrity manifests itself in actions, which require the employment of capacities such as skills and resources. For example, law enforcement officials with high levels of integrity but insufficient skill sets will not be able to put their integrity to good use. Building the integrity of law enforcement agencies without providing for basic capacities can even be counterproductive and result in calls to be “tough on crime” at the expense of basic norms and standards.
- 52 I follow the notion of trust developed by de Greiff in “The Role of Apologies,” where he argues that trusting an institution involves “knowing that its constitutive rules, values, and norms are shared by participants and that they regard them as binding.”
- 53 Ibid.
- 54 In his chapter in this volume, de Greiff develops the argument that a coherent approach to transitional justice is more credible and effective.
- 55 Key international codes include the following: *Code of Conduct of Law Enforcement Officials* (1979); *Basic Principles on the Use of Force and Firearms* (1990); *Body of Principles for All Persons under Any Form of Detention or Imprisonment* (1988); *Basic Principles for the Treatment of Prisoners* (1990); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (1989); *Basic Principles on the Independence of the Judiciary* (1985); *Guidelines on the Role of Prosecutors* (1990); *Convention against Corruption* (2003).
- 56 United Nations High Commissioner for Human Rights, “Human Rights and Law Enforcement. A Manual on Human Rights Training for the Police,” *Professional Training Series No. 5* (1997); and United Nations High Commissioner for Human Rights, “Human Rights and Law Enforcement. A Trainer’s Guide on Human Rights for the Police,” *Professional Training Series No. 5/Add. 2* (2002).
- 57 Christopher E. Stone and Heather H. Ward, “Democratic Policing: A Framework for Action,” *Policing and Society* 10 (2000): 22 (noting that “training alone has limited impact unless coupled with practical reforms in management, deployment and supervision”).
- 58 As de Greiff has argued, “the recovery of trust in institutions requires not only that the basic underlying norms be legitimate, but also, that the institutions be effective in realizing those norms.” This view is underlined by the position according to which the validity of legal norms depends on their legitimacy, but also on their effectiveness, as articulated by Jürgen Habermas, in chapters 3 and 4 of *Between Facts and Norms*. In the Postscript to this work, Habermas offers a succinct expression of this point: “A legal

norm has validity whenever the state guarantees two things at once: on the one hand, the state ensures average compliance, compelled by sanctions, if necessary; on the other hand, it guarantees the institutional preconditions for the legitimate genesis of the norm itself, so that it is always at least possible to comply out of respect for the law" (*Between Facts and Norms*, William Rehg, trans. [Cambridge, MA: MIT Press, 1996], 448. Also quoted in de Greiff, "The Role of Apologies.")

- 59 Janet B. L. Chan, "Governing Police Practice: Limits of the New Accountability," *British Journal of Sociology* 50, no. 2 (1999): 252–53.
- 60 The following categories are adapted from Stone and Ward, "Democratic Policing," 16–17. Stone and Ward provide a comprehensive framework to advance democratic accountability of police.
- 61 A third, informal level of accountability is provided by civil society oversight such as the media and human rights monitoring and other informal oversight by nongovernmental organizations. This level is discussed below.
- 62 For example, following the 2002 Sun City accords, estimates of the total number of police officers in the Democratic Republic of Congo ranged from around ninety thousand to one hundred forty thousand officers. Haiti provides another example. Following the departure of President Aristide in 2004, estimates provided by credible sources ranged from two thousand to six thousand members of the Haitian National Police. In Burundi's recent transition, the police swelled from around two thousand to an estimated twenty thousand members in 2006 following the integration of representatives from various armed factions. No precise figures were, however, available. These figures were provided by Burundi authorities to a team from the International Center for Transitional Justice during advisory missions in 2006.
- 63 For a full description of a census and identification process, see UN Department for Peacekeeping Operations, "DPKO Policy: Census and Identification of Law Enforcement Officials," DPKO/PD/2006/00020 (2006).
- 64 United Nations, *Code of Conduct for Law Enforcement Officials*, preambular para. d.
- 65 The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* set out, in principles 11 and 22–26, reporting and review procedures for the use of force and firearms. The *Basic Principles* were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990.
- 66 United Nations, *Code of Conduct for Law Enforcement Officials*, preambular para. d. A substantial body of literature is available on external oversight of law enforcement agencies. For an introduction to civilian oversight, see Joel Miller, "Civilian Oversight of Policing. Lessons from the Literature," Global Meeting on Civilian Oversight of Police, Los Angeles, May 5–8, 2002; http://www.vera.org/publication_pdf/178_338.pdf.

- 67 Examples of independent civilian oversight bodies include the Independent Complaints Directorate in South Africa, the Police Services Commission in Nigeria, the Independent Police Complaints Commission in the United Kingdom, the Police Public Complaints Authority in Jamaica, and numerous police review boards in the United States. For information on police review boards in the United States, see <http://www.nacole.org/>, the website of the National Association of Civilian Oversight of Law Enforcement.
- 68 Innocent Chukwuma, "Internal Disciplinary Systems as Important Complement to External Oversight of Police in Nigeria," in *Civilian Oversight and Accountability of Police in Nigeria*, ed. Etannibi Alemika and Innocent Chukwuma (Lagos: Center for Law Enforcement Education, 2003), 58.
- 69 David Bayley suggests that a democratic police should be "accountable to multiple audiences through multiple mechanisms." David H. Bayley, "The Contemporary Practices of Policing: A Comparative View," paper presented to the Center for Strategic and International Studies and the Police Executive Research Forum (October 6, 1997); quoted in Stone and Ward, "Democratic Policing," 15.
- 70 Police Service Commission Act (2001), Section 6. See Etannibi E. O. Alemika, "Police Accountability in Nigeria: Frameworks and Limitations," in *Civilian Oversight and Accountability of Police in Nigeria*, ed. Alemika and Chukwuma, 41–43.
- 71 *Report of the Secretary-General on the United Nations Mission in Bosnia and Herzegovina*, 1, 4.
- 72 Orentlicher, *Report*, 17 (noting that "[a]dequate representation of women and minorities is essential to... ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions").
- 73 United Nations, *Code of Conduct for Law Enforcement Officials*, preambular para. a (noting that "every law enforcement agency should be representative of and responsive and accountable to the community as whole"). For an overview of arguments for broad representation, see Mary O'Rawe and Linda Moore, *Human Rights on Duty. Principles for Better Policing: International Lessons for Northern Ireland* (Belfast, Northern Ireland: Committee for the Administration of Justice, 1998), 20–61.
- 74 David H. Bayley, *Democratizing the Police Abroad: What to Do and How to Do It* (Washington, DC: US Department of Justice, 2001), 13–14. Bayley identifies responsiveness as the first of four normative prescriptions of democratic policing.
- 75 Stone and Ward, "Democratic Policing," 23–27.
- 76 Bayley, *Democratizing the Police Abroad*, 13.
- 77 The argument in this section is based on de Greiff, "The Role of Apologies."
- 78 For a comprehensive analysis of the function of apologies in transition, in particular their norm-affirming function, and how apologies can complement other transitional justice mechanisms, see de Greiff, "The Role of Apologies."

- 79 Ibid.
- 80 Ibid.
- 81 In his chapter in this volume, de Greiff develops the argument that the various transitional justice measures aim “to provide recognition to victims, not only as victims, but importantly, as *rights bearers*.”
- 82 In 2000–2001, for instance, the United Nations Mission in Bosnia and Herzegovina conducted together with the Ministries of Interior a public information campaign to raise public awareness about citizens’ rights and duties in their contacts with the police. The campaign focused on situations where citizens frequently come in contact with the police. These included traffic, evictions, arrest and custody, and investigation of crimes.
- 83 Coordination with other institutional reform efforts is also necessary from an operational perspective to ensure that they do not compete for the same resources and work against each other but reinforce and support each other efficiently.
- 84 In the preceding three sections of this chapter, I describe measures that are particularly important, in addition to vetting, to effectively reform abusive institutions and to develop a coherent approach to institutional reform in transitional settings.
- 85 See chapter by de Greiff in this volume.
- 86 On the principle of individual responsibility and other relevant legal norms, see above and chapter by Andreu-Guzmán in this volume.
- 87 Article 14 of the International Covenant on Civil and Political Rights.
- 88 Article 25 of the International Covenant on Civil and Political Rights.
- 89 Institutional differentiation is also needed for operational reasons. The number of persons to be vetted, for instance, will be significantly smaller when the process covers the judiciary rather than the police. Operational factors will be further discussed below.
- 90 Authoritarian rule, on the other hand, is not characterized by an absence of government authority but by an abuse of it. Therefore, when former rulers hold on to power in one way or another in the post-authoritarian context, the existence of political will is of greater concern than the existence of actual government authority.
- 91 The kind and level of international involvement in a transition constitutes an important factor in building political will and supporting the implementation of a vetting process. A discussion of the potential role of international actors goes beyond the scope of this chapter.
- 92 See John P. Kotter, *Leading Change* (Cambridge, MA: Harvard Business School Press, 1996), 119. Kotter shows that people in institutions frequently resist change. But “quick wins” demonstrate the benefits of change, and are thus important to garner support for the reform process and move it forward. Along similar lines, de Greiff argues that vetting may remove sources of opposition to reform and facilitate its implementation; see his chapter in this volume.

- 93 Vetting is defined as a process of assessing the integrity of individuals to determine their suitability for continued or prospective public employment. See International Center for Transitional Justice, "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines," Sections I and IV.E., in this volume.
- 94 A purge can also lead to a governance gap; see above on de-Baathification.
- 95 The Council of Europe developed guidelines to design a vetting process in the post-communist contexts of Central and Eastern Europe. See Council of Europe, *Measures to dismantle the heritage of former communist totalitarian systems*, Doc. 7568 (June 3, 1996).
- 96 A vetting process has, for instance, been put in place for the police in post-conflict Liberia with significant involvement of the United Nations. So far, no comprehensive assessment of United Nations vetting efforts has been conducted.
- 97 See, for instance, my chapter on Bosnia and Herzegovina in this volume. The recent post-conflict transitions in sub-Saharan Africa provide additional examples of the breakdown of institutions and formal processes.
- 98 See, for instance, the chapters on the Czech Republic, former East Germany, Hungary, and Poland in this volume. For a systematic discussion on the challenges of information collection and processing in vetting processes, see chapter by Rumin in this volume.
- 99 For instance, the High Judicial and Prosecutorial Council in Bosnia and Herzegovina turned into the regular judicial services commission responsible for all appointment and disciplinary matters once the exceptional (re)appointment process was completed. See my chapter on Bosnia and Herzegovina in this volume.

CHAPTER 13

Vetting and Transitional Justice

Pablo de Greiff

Various measures that can be loosely grouped under the label of “vetting” have long been a part of common practice in post-conflict and post-authoritarian transitional situations. Although we will tighten the meaning of the term below, one only has to recall the massive purges of collaborators that took place in many countries in the aftermath of World War II; or that a good number of the countries in the “third wave” of democratization, to use Huntington’s term, including Greece, one of the countries with which the wave started, implemented vetting measures.¹ And the practice continues apace despite the fact that it remains largely understudied, and that frequently the measures implemented are acknowledged to be less than successful even in generous interpretations of “success.”² The lack of clarity and the obfuscation that pervade the general issue cover not only questions about the potential and limitations of vetting measures, or basic questions about implementation—which the thematic chapters in this volume address—but also questions about the justification and the ends of vetting.

This chapter concentrates on the latter set of issues, on questions of aims and justification. Among other things, it will try to clarify the purposes that can legitimately be sought through vetting measures.³ Two caveats are in order. First, of course, a complex practice can always be set in place in order to achieve more than one aim. Second, the defining aims of a practice always underdetermine the shape the practice should take. This chapter does not assume a reductionistic position concerning the ends of vetting—accepting that it can pursue plural ends at the same time—nor a normatively naive position according to which, having defined the aims of a practice, its “blueprint” follows as if through simple deduction—accepting, of course, that there are different means of satisfying a given aim. Having said this, however, questions about ends and justification do set some constraints on practice and implementation. And precisely because vetting is a practice that, both in the distant and in the recent past, has known so many examples of *unrestraint*, this is an important exercise. This chapter will defend an understanding of vetting that

emphasizes its preventive aims (and deemphasizes both the punitive and the deterrent justifications) and will seek to clarify the relationship between vetting and other transitional justice measures by examining the potential of vetting as an enabling condition of the other transitional justice measures, and, at a more conceptual level, by examining its potential to foster the trust of citizens in the institutions of the state.

VETTING AND IMPUNITY

The idea of ridding institutions of abusers and collaborators in the aftermath of conflict or authoritarianism, as is well known, has a long (but not necessarily distinguished) history.⁴ At the most general level this is an expression of the desire for a new beginning, or at least a renewal, which is perfectly understandable under such circumstances. However, there is no such thing as a “new beginning” and the idea of renewal is nothing more than shorthand for something that requires articulation. Consequently, not just any means for satisfying these inchoate desires will be the object of consideration here. I will follow recent efforts to distinguish vetting measures from massive, summary dismissals or purges, and will use the term “vetting” to refer to processes for assessing the integrity of individuals to determine their suitability for continued or prospective public employment.⁵ The reason why purges and massive, summary dismissals should not be considered forms of vetting, properly speaking, has nothing to do with numerical considerations, but rather with the criteria used for dismissals and the procedures and guarantees that are applied in either case; vetting here designates processes in which the criteria of assessment relate to *individual* behavior, which therefore calls for individual review, and for offering individuals some procedural guarantees. Mere membership in groups, including political parties, should not be the primary criterion of exclusion. Clearly, just as many—or few—people can be excluded through vetting as through purges; the numbers ultimately depend, to begin with, on how widespread the perpetration of violations may have been. What is critical, from the standpoint of justice, is, precisely, to select criteria designed to track individual abusive behavior.⁶

VETTING AS A PUNITIVE, DETERRENT, AND PREVENTIVE MEASURE

Regardless of where the exact boundaries of vetting may be set, various aims have been ascribed to the practice, and these aims have been used to ground justificatory arguments. Given the manifest “impunity gap” faced by societies

emerging from conflict or authoritarianism, it is not surprising that vetting as well as other transitional justice measures have been thought to address this gap. My aim in this chapter is not to counter the positions I will review, but to subject them to scrutiny. However, I do not take these positions to be equally plausible or convincing. I have ordered them in increasing order of plausibility.

That vetting has a punitive dimension can be easily seen. In fact, this is part of what justifies our concern with offering procedural guarantees to those who are subject to it.⁷ Vetting subjects people to loss of jobs and income, never an indifferent loss, but particularly not under circumstances, all too common in post-conflict and transitional societies, in which economies are in crisis and job creation is stagnant if not receding. The effects of such loss are particularly severe for members of the security sector, most of whom may not be particularly highly skilled or have skills that can be easily transferred to other economic activities. But beyond that, vetting typically subjects people to shaming;⁸ being vetted out of a job is not the same as suffering the impact of, say, downsizing. The more public the exclusion, the greater the potential for becoming the recipient of the public's opprobrium.⁹

However, punishment as the main rationale for vetting should be seen as problematic, at least if it is meant as an exhaustive account. In the end, a mainly punitive interpretation of vetting highlights the impotence of the criminal justice system. Imagine a transition in which even the worst offenders, against whom there is sufficient evidence to initiate prosecutions, get off with nothing worse than being relieved of their jobs and whatever shaming that leads to. This would require some explanation, and what such explanation would try to do is to provide an account, precisely, of why these people do not receive more severe punishment.

Another way of expressing the point is the following: even if there were a society that espoused a completely nonpunitive approach to its transition, it might find good reasons to vet some of its institutions. Naturally, it would do so for reasons other than punishment.

None of this is an argument against the punitive use of vetting. The point, rather, is that the punitive rationale does not seem to capture the whole reason (or better, all the reasons) that we engage in vetting. Some of these reasons are spelled out in what follows.

Vetting, as other justice measures, could also be thought to be a deterrent. This seems to me to be either a purely aspirational claim, or an empirical one, and as such it stands or falls on empirical evidence. The problem is that gathering such evidence is peculiarly difficult, for it would have to be of the

counterfactual sort; in other words, it would require comparing outcomes (the behavior of some people with and without vetting in place) and this is the sort of experiment that we do not know how to carry out directly. Support for the proposition can be gained by proxy (for example, through comparative analysis), but this will always be a debatable ground. Leaving this epistemic problem aside, there are reasons to think that attributing strong deterrence powers to vetting is not particularly plausible: if, for example, more severe forms of punishment (including the death penalty) in “well-established,” efficient, and expeditious legal systems have dubious deterrent value, it is not far fetched to think that deterrence is not the strongest defense of vetting in the midst of all the uncertainties of a transitional situation.¹⁰

Vetting is also often said to have a preventive function¹¹—and prevention is not the same thing as deterrence. Rather than focusing on the possible reactions of individuals to particular measures, as the deterrent argument does, this claim operates at a different, more structural level. The argument takes vetting to be something akin to an anti-Mafia measure. Thus, its purpose is not primarily to send signals to *individuals* (i.e., that they will lose their jobs and social standing if they engage in certain behavior), but to disable *structures* within which individuals (who, by the way, may have refrained from criminal activity were it not for those structures) in fact carried out criminal acts. This is a more defensible position than the preceding one, fundamentally because it need not commit itself to controversial assumptions about the behavior of individuals given certain incentives. The most controversial assumption the preventive argument can simply eschew has to do with a claim about recidivist tendencies, namely that those who have committed certain offenses are more likely than others to commit them in the future. This is a questionable assumption on its own terms (for, among other reasons, it abstracts from peculiar social conditions that enable criminal activity, conditions in the absence of which many individuals may have refrained from participating in crime, and which are also, precisely, the typical conditions in conflict situations), but it also conflicts with a commitment to “meliorism”—the idea that autonomous individuals have the power to improve themselves—which is a part of the liberal doctrine that constitutional democracies try to institutionalize.¹² Vetting, then, is defended on the grounds that it may prevent the recurrence of violations, not necessarily because the sanctions it metes out (loss of job, public prestige, etc.) are sufficient to deter individuals, but because it dismantles networks of criminal activity, even if it does not reach each and every participant in activities that violate the rights of others.

VETTING AS AN ENABLING CONDITION

Up to this point the analysis of the possible aims and justification of vetting has proceeded largely in abstraction from other transitional justice measures, such as criminal prosecutions, truth telling, reparations for victims, and other forms of institutional reform. In trying to situate vetting in a transitional context, it is important to start with some caveats.

First, there have been plenty of transitions in which no formal vetting procedures, not even of rule of law institutions, have been established (e.g., Chile, Argentina, Guatemala, South Africa). There have also been transitions with very modest and sector-specific vetting (El Salvador, Greece, etc.). Thus, we should not overstate the importance of vetting in transitions.

Second, the relationship between vetting and other transitional justice measures depends on many factors, which include whether the different measures are deliberately designed to relate to one another, and also on how they are sequenced. This is in turn a complicated issue that hinges on many factors that are irreducibly contingent and contextual. In what follows, and for the sake of clarity in the presentation of the *potential* that vetting has to contribute to other justice measures, I assume that vetting can be implemented early on in a transitional process.¹³ Needless to say, this will not always be possible.

Third, even if, as I will argue, vetting can be considered an enabling condition of other transitional justice measures, obviously when it is botched—and there are plenty of ways of getting it wrong, including doing it through processes that offer few guarantees, that are overly expansive in their attribution of responsibility, and so on—vetting may also make the implementation of these measures more difficult. Thus, to illustrate, among transitional justice measures, arguably vetting is the one that has lent itself more frequently to political manipulation. I cannot offer a full account here of why I think this is the case, but the following factors are part of that account: post-conflict or transitional prosecutions are infrequent to begin with, and they generally involve sufficient due process guarantees so as to raise a shield against easy political manipulation; and truth-telling exercises, particularly by way of truth commissions, are also extraordinary events and the publicity that surrounds them is one among many factors that have kept such commissions from falling into the trap of partisan politics. Vetting, on the other hand, usually involves thousands of people, and the processes more often than not take place with little public scrutiny, offer weak procedural guarantees, and, contrary to even the best outcome of prosecutions or truth telling, what hangs

in the balance is (some degree of) control of public institutions — a strong incentive to engage in it for partisan political purposes.¹⁴

Vetting may also create difficulties beyond making the implementation of transitional justice measures more complicated if the process is plainly defective. That possibility needs to be acknowledged. It is often claimed that vetting may create governance vacuums.¹⁵ Perhaps the claim is overstated, given that, unlike indiscriminate purges, most vetting procedures do not lead to the dismissal of massive numbers of people.¹⁶ But that is not to say this cannot or that it has not happened. In two post-conflict cases (and also cases that may be closer to purges than to vetting as defined in this chapter), namely post-World-War-II Germany and “de-Baathified” Iraq, governance gaps appeared, leading to the rehiring of people formerly expelled from their jobs. Another difficulty that is frequently attributed to vetting is an increase in criminality. This claim may also be overstated, in particular because in very complex and fluid transitional and post-conflict situations it is not easy to isolate the effects of a single initiative. Be that as it may, it is undeniable that in some countries (e.g., Haiti) the participation in criminal activities of former members of the security forces who have been vetted has increased, and that in itself is a worrisome trend.

Fourth, and once again in the spirit of tempering naive hopes, we do well to remember that under most circumstances vetting, like the other transitional justice measures, will only weed out the worst elements in an institution, leaving plenty of “undesirables” in place.

Having said all of this, however, it is still possible that vetting may indeed facilitate the application of measures such as criminal prosecutions, truth telling, reparations for victims, and other forms of institutional reform. That is, vetting may be thought of as an “enabling condition” of other transitional justice measures.¹⁷ Local human rights NGOs in Morocco, for example, have claimed that the lack of cooperation with the recent truth commission, the *Instance Équité et Réconciliation* (IER),¹⁸ on the part of some sectors of the security forces can be explained by the continued presence of officials who should have been vetted. Thus, the absence of vetting made truth telling more difficult, and, the claim is, by contrast, that the IER would have been more effective in its truth-telling function if, as is likely had these officials been vetted, it could have accessed these institutions’ archives and have had more unhindered access to other members who would then have been willing to give testimony.¹⁹

Similarly, there are instances in which vetting may facilitate criminal prosecutions. Argentina may be a case in point. As is well known, the prosecutorial

efforts started by President Raúl Alfonsín—which led to the trials of the junta leaders²⁰—came to a halt in that country after a series of coup attempts.²¹ Had some of the military officers been vetted, perhaps it would have been more difficult for them to organize the uprisings. The fact that the rebellious officers were mostly junior increases the plausibility of the thesis. Of course, it is possible that they may have revolted by virtue of the mere chance of being vetted, but in the calculus of probabilities the fact that vetting, for all its punitive effects, is *not* the same as a criminal sentence must be factored in, even if by itself this may have been insufficient to tip the scales against the officers organizing the revolts. The question is open in this instance, but the general point remains: it is not unreasonable to think that security forces that have been vetted may collaborate more with, or at least impede less, prosecutorial efforts.

The relationship between vetting and reparations is slightly more complicated, but here again similar conclusions may be reached, even if through a more indirect path. One can imagine situations in which an argument analogous to that made to show how vetting can facilitate the implementation of truth telling and prosecutions could plausibly be defended regarding reparations. To begin with, to the extent that reparations are a form of recognition of state responsibility,²² those who are responsible for the abuses are likely to oppose the establishment of reparations programs. Thus, vetting those responsible for the abuses may weaken one of the sources of resistance to reparations.

However, unlike criminal prosecutions and even truth telling, which cannot be successfully implemented without thereby affecting fundamental interests of those responsible for the violations (hence their opposition to these measures), it is sometimes thought that reparations *can* be successfully implemented without the perpetrators having to pay this price. Indeed, reparations have sometimes become the object of a proposed bargain (rarely so grossly articulated, but real nevertheless): reparations benefits of a certain magnitude are offered to victims in exchange for leniency in the domains of prosecutions and truth telling. Thus, for example, in the aftermath of Pinochet's return from detention in England, when it was clear that criminal prosecutions against members of the military were in the cards for Chile, the political party aligned with him, the *Unión Demócrata Independiente* (UDI), traditionally lukewarm on the topic of reparations, suggested a major restructuring of the reparations programs that had been in existence for more than ten years, so as to expand their coverage, and, importantly, to significantly increase the magnitude of their benefits, but with one catch: beneficiaries had to waive all

claims against perpetrators.²³ Fortunately, this proposal did not prosper. This is by far not the only example of this sort of bargain. Arguably, a bargain of this sort underlies the law passed in Colombia in 2006 to demobilize paramilitary forces known to be responsible for gross human rights violations.²⁴ Although neither of these two cases involved vetting directly, they show how reparations can become the subject of peculiar political dynamics that sometimes lead perpetrators or their backers to *support* the implementation of reparations measures (but only as part of a *quid pro quo*). Clearly, this is “support” that reparations can do without, so even in cases such as these, vetting may facilitate the implementation of legitimate and effective reparations programs.

Finally, it is reasonable to think that vetting may also facilitate the broader sorts of institutional reform measures that are often called for in the aftermath of conflict and in transitions to democracy.²⁵ The argument again is that vetting may weaken sources of opposition and resistance to reform especially regarding, for example, the restructuring, downsizing, and rationalization of security forces; predictably, this will be easier to accomplish once entrenched interests in maintaining the status quo have been dislodged from positions of power.²⁶

It is important to reiterate that the preceding arguments are not meant to yield *predictions*. Whether vetting in fact enables or impedes the implementation of other transitional justice measures is an empirical matter that cannot be decided *a priori*. All sorts of intervening causes and incentives play a significant role in leading to specific outcomes. The arguments presented here also assume what must be acknowledged to be a simplistic relationship between vetting and other transitional justice measures: that these measures are sequenced in a particular way, with vetting coming early in the process or at least sufficiently earlier than other measures so as to allow them to benefit from its results, something which cannot be taken for granted either. Nevertheless, my hope is that to the extent that the arguments are reasonable, they help to clarify the reasons why it makes sense for post-conflict and transitional societies to try to vet their security forces, as well as one particular way in which vetting can relate to other transitional justice measures.

VETTING AND A HOLISTIC CONCEPTION OF TRANSITIONAL JUSTICE

In order to fully understand the place of vetting in a transitional justice policy, one has to go beyond contingent pragmatic relationships, as important

as these may be. In the final part of this chapter I will argue that there is a compelling conceptual argument to think of vetting as part of a holistic transitional justice policy. Despite the fact that each of the measures that form a part of such a policy—criminal prosecutions, truth telling, reparations, and institutional reform (of which vetting is one modality²⁷)—has its own specific goals, they share two mediate goals, namely, to provide recognition to victims, and to foster civic trust.²⁸ Now, these goals are closely related to justice, being both conditions and consequences of the achievement of justice. Achieving justice through the legal system presupposes that those whose rights have been violated are recognized as having standing, and this means that they are recognized as individuals, as victims, and more fundamentally as rights bearers. At the same time, the achievement of justice contributes to entrenching these forms of recognition. Similarly, civic trust is both a condition and a consequence of justice. Legal systems presuppose a certain level of trust, and at the same time, at least in part by stabilizing expectations, help lower the risks associated with trust.²⁹ So, beyond the commonality of ends, what ties together the different elements of a transitional justice policy is the peculiarity of these ends, namely that they are justice related in just this way. This is what makes the different measures part of a *holistic* conception of transitional justice.

Having this as a background, since the main goal of this chapter is not to present a particular conception of transitional justice but to clarify the practical and conceptual relations between vetting and other transitional justice measures, I will concentrate here on its trust-inducing potential.³⁰

VETTING AS A TRUST-INDUCING MEASURE

In societies emerging from conflict or authoritarianism, vetting may have trust-inducing consequences. This is important for several reasons, which I will elaborate after a brief description of a norm-based account of trust. These reasons include that trust facilitates social interactions and there is a strong connection between trust and justice.

A NORM-BASED ACCOUNT OF TRUST³¹

Before attempting to explain how vetting may be thought to induce trust, it will be necessary to specify a conception of the type of trust in question. Trust in general, as a disposition that mediates social interactions, “is an alternative to vigilance and reliance on the threat of sanctions, [and] trustworthiness... an alternative to constant watching to see what one can and cannot get away

with, to recurrent recalculations of costs and benefits.”³² Trust, then, at a general level, contrasts with the sort of constant monitoring and appeals to sanctions that speak of suspicion.

Still, it can be said that while trusting someone involves relying on that person to do or refrain from doing certain things, trust is not the same thing as mere predictability or empirical regularity. If that were so, the paradigm of trust would obtain in our relationship with particularly reliable machines. That reliability is not the same as trustworthiness can be seen in our reluctance to say that we *trust* someone about whose behavior we feel a great deal of certainty but only because we both monitor and control it (e.g., through enforcing the terms of a contract), or because we take defensive or preemptive action.³³ Trust, far from resembling a sort of “mechanical reliability,” involves an expectation of a shared *normative* commitment. I trust someone when I have reasons to expect a certain pattern of behavior from her, and those reasons include not just her consistent past behavior, but also, crucially, the expectation that among her reasons for action is the commitment to the norms and values we share. In this sense, although trust does not involve normative symmetry—trust is possible within largely asymmetrical relationships including those within deeply hierarchical institutions—it does involve normative reciprocity: trust develops out of a mutual sense of commitment to shared norms and values. This explains both the advantages of trust and the risks it always involves: dispensing with the need to monitor and control facilitates cooperation immensely, and not only by lowering transaction costs; but as a wager (no matter how “safe”), that at least in part for *normative reasons* those we trust will not take advantage of our vulnerabilities, we risk having our expectations defeated.

Now, the term “civic” in “civic trust” I understand basically as a limiting qualifier. Trust can be thought of as a scalar relationship, as one that allows for degrees. The sense of trust at issue here is not the thick form of trust characteristic of relations between intimates, but rather “civic” trust, which I take to be the sort of disposition that can develop among citizens who are strangers to one another, and who are members of the same community only in the sense in which they are fellow members of the same political community. True, the dimension of a wager is more salient in this case than in that of trust towards intimates, since we have much less information about others’ reasons for actions. However, the principles that we assume we share with others and the domain of application of these principles are much more general. To illustrate, the loyalty that binds me to intimates is significantly thicker

than the loyalty to, for example, a common political project that binds me to fellow citizens.

TRUST AND SOCIAL INTERACTION

Despite its thinness, some form of civic trust is crucial for large-scale social interactions. This is most obvious in the domain of economics, where the effects of distrust have long been studied: weak networks of trust severely limit the range of options of action available to economic agents. An environment characterized by mistrust is one that requires agents to make large investments in information, monitoring, and sanctioning.³⁴ The opportunity costs of such investments may be large enough by themselves to put more than a dent in economic productivity. Hence, it is not surprising to find that “interpersonal trust is strongly linked with economic development.”³⁵ Of course, the effects of distrust can go far beyond increasing transaction costs; it is an understatement to say that in such contexts certain actions are considered as live options—as opposed to merely theoretically possible courses of action—only to be discarded because they have become “too expensive.” What likely happens under these circumstances is that the range of options to be considered is significantly constrained, and even preferences themselves are adapted downwards.³⁶

There is no reason to believe that these effects of the lack of trust are confined to the economic sphere. Indeed, in the domain of democratic politics, in which gathering information about what others are doing, monitoring their activities, and relying on sanctions become not simply “expensive” but may undermine both the legitimate means and ends of democracy, the absence of trust is particularly pernicious. Given democratic constraints, it is especially true that interpersonal trust is essential to the cooperation with strangers that is a prerequisite for the large-scale political organization on which modern democracies are based.

TRUST AND JUSTICE

The literature on social capital is full of illustrations of the many ways in which trust facilitates all sorts of important social interactions.³⁷ This alone justifies taking an interest in measures that can promote trust. However, since the discussion thus far has taken place at a high level of generality and has pertained mostly to “horizontal trust,” that is, trust among citizens, rather than “vertical trust,” that is, trust between individuals and the institutions by which they regulate their common lives, some additional steps are called for.

Let us then return to the argument that civic trust is at one and the same time a condition and a consequence of achieving justice through a legal system. There are myriad ways in which a legal system relies on the trust of citizens.³⁸ At the broadest level, a legal system works only on the basis of citizens' generalized norm-compliance. In other words, the legal system can cope with norm-breaking behavior only when it is exceptional. This means that most social interactions are not directly mediated by law, but rather, at some level, by trust between citizens. Closer to home, however, all legal systems rely not just on the trust that citizens have towards one another but on the trust that they have in the systems themselves. In the absence of total(itarian) surveillance, criminal legal systems must rely upon citizens' willingness to report both crimes that they witness and crimes that they suffer.³⁹ And this willingness to report, of course, rests upon their trust that the systems will reliably produce the expected outcomes. This is actually a complex sort of trust: in police investigations, in the efficiency of the court systems, in the honesty of judges, in the independence of the judiciary (and therefore in the executive's willingness to protect and promote that independence), in the at least minimal wisdom of the legislature, and in the strictness (but perhaps also the simultaneous humaneness) of the prison system, and so on. Needless to say, each of these objects of trust can be further analyzed.

On the other hand, it is not just that legal systems rely upon the trust of citizens both among one another and in the system itself. Legal systems, when they operate well, also catalyze trust, once again both among citizens themselves and in the system itself. Indeed, John Rawls takes the rule of law's ability to generate social trust—which he understands in terms of the reliability of expectations—as a definitional aspect of the rule of law:

A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can *rely on one another* and rightly object when their expectations are not fulfilled.⁴⁰

To the extent that law helps to stabilize expectations, and that it helps to diminish the risks involved in trusting others, especially strangers, it contributes to the generation of trust among citizens.

As for the catalytic role of law in generating trust in legal institutions, the underlying argument should be clear: legal institutions, insofar as they are

reliable, provide further reasons for citizens to rely upon them for the resolution of their conflicts. This simply follows from the fact that trust is something that is earned, rather than arbitrarily bestowed, and this is true just as much for institutions as it is for individuals. The easier way of seeing this is by noticing attitudes towards law in societies where the legal system is perceived as inaccessible or otherwise unreliable.

But, if we are going to be precise and consistent with an account of trust that centers on norm-based behavior, our task is not done, for it is not clear what, on this account, trust in institutions might mean. Strictly speaking, if trust is a relationship that cannot be reduced to mere empirical regularity, but one that involves an awareness of mutual normative reciprocity, this is possible only among individuals, and then there is no such thing as trust in institutions. Nevertheless, we trust institutions, and the people who inhabit them. How so? Claus Offe offers the following explanation:

“Trusting institutions” means something entirely different from “trusting my neighbor”: it means *knowing* and recognizing as valid the values and the form of life incorporated in an institution and deriving from this recognition the assumption that this idea makes sufficient sense to a sufficient number of people to motivate their ongoing active support for the institution and the compliance with its rules. Successful institutions generate a negative feedback loop: they make sense to actors so that actors will support them and comply with what the institutionally defined order prescribes.⁴¹

By way of contrast, people mistrust institutions because they suspect (correctly) that the values embodied by those institutions do not “make sufficient sense to a sufficient number of people to motivate their ongoing active support for [these institutions] and the compliance with [their] rules.” Trusting an institution amounts to knowing that its constitutive rules, values, and norms are shared by its members or participants and that they regard them as binding.⁴²

The argument that I am interested in exploring is that well-designed vetting measures can be trust inducing, that they can promote trust in institutions.⁴³ The initial plausibility of this claim is easy to see if we start with the oft-reported effects on victims and others of encounters with former perpetrators still in positions of authority.⁴⁴ Particularly chilling examples are often reported by women who encounter police officers who abused them, sometimes as they searched for missing relatives. Predictably, it will be

impossible for an institution inhabited and operated by such personnel to garner the trust and confidence of those it is intended to serve, when the latter had become their victims.

This commonsensical explanation of the untrustworthiness of institutions that have not vetted their personnel after periods of widespread abuse is fine—as far as it goes. But it risks underdescribing the sources of distrust in these institutions; distrust under such circumstances usually does not target the particular individuals known (or suspected) to be responsible for violations, but the institutions as a whole. Why is this the case? The norm-based account of trust sketched above suggests an answer: the continued presence of known violators in the ranks of the police and other security forces, for example, betrays that the basic rules of the legitimate exercise of power, and specifically of the use of force, do not “make sufficient sense to a sufficient number of people to motivate their ongoing active support for the institution and the compliance with its rules.” Again, the critical point is that the lack of commitment to rules is not just that of the perpetrators, but rather a broader, systemic problem; the institution is distrusted for having employee retention “policies” that keep these people in their jobs; for having a culture of cronyism that protects perpetrators from being sanctioned; for having weak oversight structures; for having a lack of commitment to the prevention of the recurrence of abuses, and so on. If trust is plausibly accounted for in terms of commitment to norms, given the generality of the relevant norms, it is easy to see how breaching them impacts on the trustworthiness not only of the rule breaker, but of the institution of which she or he is a member.

Conversely, vetting those responsible for human rights abuses signals seriousness and commitment that goes beyond issues of personnel selection alone. The general point is that although, as Alexander Mayer-Rieckh has argued in this volume, vetting should properly be seen as part and in need of a broader array of institutional reform tools, and as an instrument that concerns mainly personnel, choices about the latter can be, with good reason, taken to reflect institutional commitments to norms. “Repeopling” abusive institutions with new faces (and, of course, under reliable and transparent procedures), then, is not a bad indication of whether basic norms have acquired the requisite sense to make institutions *trustworthy*. This is important in its own terms, and also as a contribution to, and a consequence of, the application of soundly designed, holistically conceived transitional justice measures.

Modesty about the reach of vetting with, but particularly without, other transitional justice measures is called for; re-peopling unreconstructed institutions with new faces will obviously not, by itself, correct all institutional

defects: thus, in a country in which there are many different institutions in the area of security with overlapping mandates and attendant weakening of oversight and accountability, leaving these institutions unmodified is unlikely to significantly transform their trustworthiness in the short or the long run, no matter how many new faces are brought in. Similarly, no matter how much personnel is renovated and how thoroughly institutions are reformed, unless these reforms are accompanied by other transitional justice measures such as prosecutions, truth-telling, and reparations for victims, there will always be a significant sense in which important claims to justice would remain unredeemed. This is one of the implications of arguing that although institutional reform (including vetting) can make a contribution to transitional justice, on its own, of course, it cannot bear the full weight of the multiple and various claims to justice that arise in post-conflict and post-authoritarian transitional situations.

NOTES

I have benefited from comments offered by Roger Duthie and Alexander Mayer-Rieckh, and from discussions during the meeting of authors held at the Rockefeller Foundation's Bellagio Study Center. The views expressed in this paper do not necessarily represent the ICTJ's position.

- 1 See Samuel Huntington, *The Third Wave* (Norman: University of Oklahoma Press, 1993). For a salutary, "revisionist" account of vetting in Greece, see the chapter by Sotiropoulos in this volume.
- 2 With the appearance of two ambitious studies of reparations for victims of human rights violations, which add to the copious literature on criminal prosecutions and the growing one on truth commissions, it is now even truer than ever that vetting is the least studied transitional justice measure. To be sure, after the great transformation of the Eastern and Central European countries post-1989, academic interest in "lustration" followed, but since then the topic has garnered remarkably little attention. Some of the earlier studies on vetting are reproduced in Neil Kritz, ed., *Transitional Justice* (Washington, DC: United States Institute for Peace, 1995), vol. 1. The two recent studies on reparations are Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) and K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens, eds., *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen: Intersentia, 2006). On criminal prosecutions see Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998), and now, the articles in a dedicated journal, the *Journal of International Criminal Law*. On truth commissions, see Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001).
- 3 This chapter examines questions of the aims and justification of vetting primarily from a human rights perspective. In the literature on state building, for example, vetting is defended on grounds of security, of the orderly management of governance institutions, and of the "signaling effect" of vetting, that is, its use to indicate a regime change. I will not examine these arguments here.
- 4 See, for instance, Herbert Lottman, *The Purge: The Purification of the French Collaborators After World War II* (New York: William and Morrow, 1986), and the papers in part 2 of Jon Elster, ed., *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006).
- 5 International Center for Transitional Justice, "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines," Sections I and IV.E, in this volume.
- 6 "Abusive behavior" is used instead of "criminal behavior," mainly because there may be circumstances in which gross violations of human rights, serious crimes under international law, or other forms of serious misbehavior have not been locally criminalized, and yet may become vetting criteria.

- 7 On this topic, see chapter by Andreu-Guzmán in this volume.
- 8 The shaming potential of vetting measures can be enhanced or diminished through different design features; people with “positive” vetting records (i.e., those whose records provide grounds for exclusion) can be given the opportunity to resign and their records kept confidential (as in Hungary), or they can be fired and their records made public. In Argentina, which does not have a formal vetting procedure, military promotions can be impugned in a process that involves public hearings in the Senate. See the chapters by Barrett, Hack, and Munkási in this volume.
- 9 Whether the potential is realized is a factual, empirical, and highly contextual matter. In Poland, for example, the vetting procedure, to which candidates for public office among others had to submit, did not punish collaboration with the communist secret services, but only making a false vetting declaration. This meant that the collaboration of many candidates became a subject of public knowledge. The expectation of the framers of the law was that this would dissuade the electorate from voting for candidates with a record of collaboration. But for many reasons, which may include the long time lag between the relevant activities and the coming into effect of the law, that the relevant “crimes” were not violent crimes but the giving of information to the former secret services, and that this was something that tens of thousands of people did, a good number of candidates in these situations were actually elected, despite their previous collaboration. See chapter by Czarnota in this volume.
- 10 The forms of uncertainty that are relevant for this argument are at least twofold. The first is about the course of the transition. The fact that, especially at the pre-transitional stage and even in the early stages of the transition, it is rarely a foregone conclusion that a new regime intent on vetting will be able to consolidate its hold on power may weaken the deterrent potential of any proposed measure (and may actually generate incentives to block the transition). The second has to do with uncertainties (doubts) about the probabilities of being subject to *any* justice measure. It has been observed in the criminological literature that beyond a certain threshold, more than the length of sentence, what ends up having deterrent potential is the degree of certainty of being apprehended, tried, and convicted, and hence having to serve a sentence. In countries where the security and justice sectors have been left in disarray, this is highly unlikely. It is doubtful that vetting has a significant deterrent power.

As for the general deterrence power of the death penalty, obviously the greatest penalty, see the materials of the Death Penalty Information Center, on whose website one reads:

Even as the use of the death penalty continued to decline in the United States, the number of murders and the national murder rate dropped in 2004. According to the recently released FBI Uniform Crime Report for 2004, the

nation's murder rate fell by 3.3%, declining to 5.5 murders per 100,000 people in 2004. By region, the Northeast, which accounts for less than 1% of all U.S. executions, continued to have the nation's lowest murder rate, 4.2. The Midwest had a murder rate of 4.7, and the murder rate in the West was 5.7. The South, which has carried out more than 80% of all U.S. executions, again had the nation's highest murder rate, 6.6.

See <http://www.deathpenaltyinfo.org/article.php?did=2065> (accessed November 1, 2006).

- 11 See Mayer-Rieckh's chapter on vetting and other institutional reforms in this volume.
- 12 For a succinct account of meliorism as a liberal commitment, see John Gray, *Liberalism* (Minneapolis: University of Minnesota Press, 1995).
- 13 For the view that vetting is better done early in a transition or not at all, because postponing it increases the risk of partisan political manipulation of the process (a view largely based on Central and Eastern European experiences), see Charles Bertschi, "Lustration and the Transition to Democracy: The Cases of Poland and Bulgaria," *East European Quarterly* 28, no. 4, (1995): 435–51, and Carmen González-Enríquez, "Decommunization and Political Justice in Central and Eastern Europe," in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González-Enríquez, and Paloma Aguilar (Oxford: Oxford University Press, 2001), 218–47.
- 14 The targeting of thousands of people, the uneven publicity, and the weak procedural guarantees are features that vetting shares with many reparations programs. However, the partisan political stakes of vetting are significantly higher, which might explain why despite the similarities the claim that vetting has lent itself to more political manipulation than reparations remains plausible. For a review of the politicization of lustration processes in Central and Eastern Europe, see Cynthia Horne and Margaret Levi, "Does Lustration Promote Trustworthy Governance? An Exploration of the Experience of Central and Eastern Europe," in *Building a Trustworthy State in Post-Socialist Transition*, ed. Janos Kornai and Susan Rose-Ackerman (New York: Palgrave, 2004), 52–74.
- 15 See, e.g., Bruce Ackerman, *The Future of the Liberal Revolution* (New Haven, CT: Yale University Press, 1993).
- 16 Even in the Czech Republic, whose vetting system applied quite extensively, the numbers of people actually removed from their jobs was comparatively small. See chapter by Priban in this volume.
- 17 Again, notice the modality. This is not a predictive claim. Whether vetting facilitates the application of other transitional justice measures is an empirical matter.
- 18 Morocco's *Instance Équité et Réconciliation* (IER) was established in 2004 by King Mohammed VI to investigate human rights violations (forced disappearances, arbitrary deten-

tion, torture, sexual abuse, deprivation of the right to live as a result of unrestrained and inadequate use of state force, and coerced exile) during the period 1956 to 1999—a period which overlaps almost completely with the reign of the King's father, Hassan II, who ruled from 1959 to 1999. This was not a truth commission operating in a situation of “regime change.” In addition to a great deal of institutional continuity in the country, there was also lingering personnel continuity. Most of the worst abusers had retired by the time the IER started its investigations, but not all. No vetting has taken place in Morocco to this date, and this is one of the demands of human rights NGOs. Interviews conducted in Rabat, with various human rights organizations during 2005–2006.

- 19 The IER itself complained of “inadequate cooperation” on the part of some authorities. In its summary of findings, it says: “The Commission faced obstacles in its truth-seeking mission, including the limitations of certain oral testimonies and their fragility. However, these were overcome by referring to written sources. Other difficulties relate to the deplorable state of national archives and the inadequate cooperation of certain authorities, whereby certain officials gave incomplete answers about cases they were questioned about, while certain former, retired officials refused altogether to contribute to the efforts to reveal the truth.” IER, “Summary of the Findings of the Final Report” (Rabat, n.d.), 6.
- 20 In December 1985 the trial of the nine heads of the military juntas in Argentina ended with the following results: General Jorge Videla and Admiral Emilio Massera were sentenced for life; General Roberto Viola to seventeen years in prison; Admiral Armando Lambruschini to seven years; Brigadier Raúl Agosti to four-and-a-half years; General Leopoldo Galtieri, Brigadiers Rubén Graffigna and Basilio Lami Dozo, and Admiral Jorge Anaya were absolved. Although all of them benefited from the pardons extended by President Carlos Menem in 1989, as it turns out this was not the end of their confrontation with the criminal justice system. The literature on Argentina is extensive. See, e.g., Alexandra Barahona de Brito, “Truth, Justice, Memory, and Democratization in the Southern Cone,” in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González-Enríquez, and Paloma Aguilar (Oxford: Oxford University Press, 2001), 119–160.
- 21 On the military uprisings in Argentina, see Deborah Norden, *Military Rebellion in Argentina: Between Coups and Consolidation* (Lincoln: University of Nebraska Press, 1996).
- 22 As I have argued they *ought to be* if the benefits are to count, legitimately, as reparations; see Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), 451–477.
- 23 See, for example, “La Paz Ahora” (UDI's proposal), published in *La Nación*, June 20, 2003; <http://www.lanacion.cl>.
- 24 Law 975, 2006.

- 25 Mayer-Rieckh, in his chapter on vetting and other transitional reforms in this volume, insists again on the importance of seeing vetting as only one narrow measure in the domain of institutional reform, and one that frequently needs to be accompanied by others if its effects are to be significant and long lasting.
- 26 Vetting's potential to help implement these different transitional justice measures in the first place is enabling in a different way: as Mayer-Rieckh has argued, vetting may improve the efficiency of rule of law institutions so that they investigate crimes, render justice, provide reparations, and so on. The point is that the contribution that vetting can make to a transition goes beyond removing obstacles that may lie in the way of putting transitional justice measures in place. Vetting can contribute positively to the operation of institutions that are rarely created *de novo* or totally and thoroughly transformed.
- 27 I am following Mayer-Rieckh in thinking about vetting as a form of institutional reform, without rehearsing his argument. See his chapter on vetting and other transitional reforms in this volume.
- 28 In this chapter, both for reasons of space and of clarity, I will elaborate the argument about the trust-inducing potential of transitional justice measures in reference to vetting. I will be very brief about how the different elements of a holistic transitional justice policy provide recognition, for as far as possible, I want vetting, and not a general conception of transitional justice, to remain the focus of this paper. Thus, the following will suffice: the various transitional measures can be interpreted as efforts to institutionalize the recognition of individuals as rights bearers. Criminal justice can be interpreted as an attempt to reestablish the equality of rights between the criminal and his or her victim, after the criminal severed that relationship with an act that suggested his or her superiority over the victim. Truth telling provides recognition in ways that are perfectly familiar, and which are still probably best articulated by the old difference proposed by Thomas Nagel between knowledge and acknowledgment, when he argued that although truth commissions rarely disclose facts that were previously unknown, they still make an indispensable contribution in acknowledging these facts. The acknowledgment is important precisely because it constitutes a form of recognizing the significance and value of persons—again, as individuals, as citizens, and as victims. Reparations are the material form of the recognition *owed* to fellow citizens whose fundamental rights have been violated, manifesting that the state has taken to heart the interests of those whose rights went previously unrecognized. Finally, institutional reform (to which vetting aims to contribute) is guided by the ideal of guaranteeing the conditions under which citizens can relate to one another and to the authorities as equals. For a full elaboration of this argument, see my “Justice and Reparations.”

In addition to serving justice in general and the two mediate goals of recognition and civic trust, transitional justice measures also share two final goals: first, social reconstruction or reconciliation, and, second, making a contribution to processes of

- democratization, but I will not discuss this here. On reconciliation, see my “The Role of Apologies in National Reconciliation Processes,” in *The Age of Apologies*, ed. Mark Gibney and Rhoda Howard-Hassmann (Philadelphia: University of Pennsylvania Press, forthcoming).
- 29 For an elaboration of this argument, see my “Truth telling and the Rule of Law,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (Notre Dame, IN: University of Notre Dame Press, 2006).
 - 30 Obviously, the fact that vetting has this potential is significant on its own terms, independent of the particular conception of transitional justice sketched in this chapter.
 - 31 The material in this section borrows from my “Justice and Reparations,” “Truth telling and the Rule of Law,” and “The Role of Apologies in National Reconciliation Processes.”
 - 32 Annete Baier, “Trust and Its Vulnerabilities,” in *Moral Prejudices* (Cambridge, MA: Harvard University Press, 1994), 133.
 - 33 Laurence Mordekhai Thomas illustrates the point with a telling example: “Trust does not amount to prediction: if I put everything under lock and key and invite you into my home, I can quite confidently predict that you will not steal anything, yet nothing is clearer than that I do not trust you.” “Power, Trust, and Evil,” in *Overcoming Racism and Sexism*, ed. Linda Bell and David Blumenfeld (Lanham, MD: Rowman and Littlefield, 1995), 160.
 - 34 Claus Offe, “How Can We Trust Our Fellow Citizens?” in *Democracy and Trust*, ed. Mark E. Warren (Cambridge: Cambridge University Press, 1999), 42–87. The economic limitations that follow from distrust go beyond those that stem from the high costs of information gathering, monitoring, and sanctioning. In the early days of the post-Soviet period, firms in the former Soviet republics, for example, conducted business only on the basis of prepayment schemes, a notoriously inefficient strategy (albeit contextually reasonable). Furthermore, these firms solved disputes via private protection rackets, which manifested, sustained, and encouraged illegal activities. See Vadim Radaev, “How Trust is Established in Economic Relationships when Institutions and Individuals Are not Trustworthy: The Case of Russia,” in *Creating Social Trust in Post-Socialist Transition*, ed. János Kornai, Bo Rothstein, and Susan Rose-Ackerman (New York: Palgrave, 2004).
 - 35 It goes without saying that this correlation is a complex one. Ronald Inglehart not only recognizes that “trust shapes economic development rates, as well as the reverse,” but he is also emphatically interested in examining other factors that might affect levels of trust, such as religion and the history of political institutions. See his “Trust, Well-being and Democracy” in *Democracy and Trust*, ed. Mark E. Warren (Cambridge: Cambridge University Press, 1999), 88–120, 91ff.
 - 36 Both Robert Goodin and Cass Sunstein have argued that at every level of income, but notoriously among the poor, preferences are accommodated to perceptions of possi-

- bility in order to avoid the acute dissonances that would follow the awareness that there is in fact no direct relationship between effort and success. See Goodin, "Laundering Preferences," in *Foundations of Social Choice Theory*, ed. Jon Elster and Aanund Hylland (Cambridge: Cambridge University Press, 1986), 75–101, and Sunstein, "Democracy and Shifting Preferences," in *The Good Polity: Normative Analysis of the State*, ed. Allan Hamlin and Phillip Pettit (Oxford: Polity Press, 1989), 196–230.
- 37 See, for example, Robert Putnam, "The Prosperous Community: Social Capital and Public Life," *American Prospect* 13 (1993): 35–42. In the literature on conflict, see Nat J. Colletta, Teck Ghee Lim, and Anita Kelles-Viitanen, *Social Cohesion and Conflict Prevention in Asia: Managing Diversity through Development* (Washington, DC: The World Bank, 2001).
- 38 For a closer analysis of this issue and of how truth-telling efforts, in particular, can contribute to the rule of law in transitional situations precisely by fostering civic trust, see my "Truth telling and the Rule of Law."
- 39 From the perspective of well-ordered societies it is hard to conceive of circumstances in which people would not bother reporting even serious crimes like murder. But this indeed happens. In Colombia, for example, during the late 1980s more than 35% of murders were never even reported. See Mauricio Rubio, *Crimen e Impunidad* (Bogotá: TM Editores, 1999).
- 40 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1972), 235. My emphasis.
- 41 Offe, "How Can We Trust Our Fellow Citizens?" 70–71.
- 42 Tom Tyler and Yuen J. Huo provide the results of empirical research that confirm that "judgments about the motives of the particular police officers and judges with whom people have personal experiences have more influence on whether people accept the decisions of these legal authorities than do evaluations of the favorability of their outcomes.... [W]hen people's actions develop out of a trust in the motives of the authorities with whom they are dealing, they consent and cooperate with those authorities' directives." *Trust in the Law* (New York: Russell Sage Foundation, 2002), 75.
- 43 Notice again the modality of the claim. This is not a prediction. The argument is about what it is reasonable to think vetting *can* achieve. Whether vetting achieves this, in fact, is of course an empirical question that depends on many factors.
- 44 See chapter by Sotiropoulos in this volume.

APPENDIX

Vetting Public Employees in Post-Conflict Settings: Operational Guidelines¹

EXECUTIVE SUMMARY

Vetting to ensure minimum standards of integrity in public service is widely recognized as an important institutional reform measure in post-conflict settings. Little systematic attention, however, has been paid to the topic, and there exists a broad variety of views about, and approaches to, vetting. This dearth of analysis affects the practice of vetting as well, and many countries emerging from conflict handle such processes poorly, and often unfairly. These operational vetting guidelines build on systematic research that included country case studies, an assessment of related United Nations practice, and a review of relevant literature.

The operational guidelines are divided into six sections. The first defines the concept of vetting and situates it in the context of institutional reform and transitional justice. The second discusses conditions for a vetting process and risks of undesirable consequences. The third section describes different types of vetting processes. The fourth proposes a methodology to design a vetting process. The fifth section presents institutional reform measures that generally need to accompany a vetting process to safeguard its results and ensure the effectiveness and sustainability of the overall reform effort. The final section provides sources of additional information on vetting within the United Nations system.

While institutional reform to prevent the recurrence of human rights abuse is an obligation under international law and vetting is a measure states are encouraged to undertake, there is significant flexibility regarding the form of vetting processes. Vetting strategies need to address the unique historical and political challenges of each society emerging from conflict. Different types of institutions also raise specific concerns, and vetting strategies need to respond to the particular requirements of the institution in question. The fundamental rights of the persons subject to vetting need, however, to be respected and the political misuse of vetting must be prevented (see below IV.E).

I. WHY VET PUBLIC EMPLOYEES IN POST-CONFLICT SETTINGS?

Vetting ordinarily refers to a process of assessing integrity to determine suitability for public employment. Integrity refers to a person's adherence to relevant standards of human rights and professional conduct, including her or his financial propriety (see below IV.C). In post-conflict settings, vetting has the specific aim of transforming institutions involved in serious abuses during the conflict into public bodies that enjoy civic trust and protect human rights. The public, and particularly victims of abuses, are unlikely to rely on institutions that retain or hire individuals with serious integrity deficits. Vetting processes aim at excluding from public service persons with serious integrity deficits in order to reestablish civic trust and relegitimize public institutions, and to disable structures within which individuals carried out serious abuses. Vetting public employees, in particular in the security and justice sectors, is now widely recognized as an important measure of governance reform in countries emerging from conflict.

But to maximize its impact and ensure its sustainability, vetting generally needs to be part of a much broader reform of the institution concerned. More often than not, integrity deficits of public employees are not the only shortcomings of public institutions in post-conflict settings, and the exclusion of persons who lack integrity may not bring about the changes necessary to build a fairly and efficiently functioning public institution. While a detailed discussion of comprehensive institutional reform goes beyond the scope of this document, the following guidelines situate vetting in the broader context of personnel reform and introduce other key institutional reform measures (see below V).

Institutional reform is an integral component of a comprehensive transitional justice policy and an obligation under international law in response to serious abuses: reforming institutions is not only critical to prevent the recurrence of human rights abuses but it also enables institutions in the security and judicial sectors to provide criminal accountability for past abuses. Vetting and excluding abusers is an institutional reform measure states are encouraged to undertake under international law in post-conflict settings. Under circumstances of limited or delayed criminal prosecutions, vetting can also help to fill the "impunity gap" by ensuring that those responsible for past abuses at least do not continue to enjoy the rewards and privileges of public office. Vetting should, however, not be used as a pretext for not pursuing criminal prosecutions. But the scarcity of resources in a post-conflict context, as well

as legal impediments and large numbers of crimes, often preclude the criminal prosecution of all abusers.

II. WHAT FACTORS DETERMINE THE DESIGN OF A VETTING PROCESS?

Post-conflict circumstances represent extremely challenging settings, and often also provide unique historical opportunities, for institutional change. In these contexts, a number of critical factors should be considered during the design of a vetting process. On the one hand, several basic conditions should be met before a vetting process is set up (A). On the other hand, the design of a vetting process should seek to prevent certain undesirable consequences (B). A thorough analysis to determine the conditions for a vetting process and to assess the risks of undesirable consequences is recommended before designing a vetting process.

A. ENSURE BASIC CONDITIONS

1. POLITICAL CONDITIONS: IS THERE GOVERNMENT AUTHORITY AND POLITICAL WILL?

A vetting process requires a measure of stability, actual government authority, and political will. Any particular transition has its own characteristics and context that might make it either more or less open to vetting. Vetting processes regulate access to positions of power and are highly political undertakings, in particular in post-conflict situations. Resistance to reform is a regular feature in countries emerging from conflict and the position of post-conflict governments is often tenuous. Individuals who risk losing power through a vetting process will resist its implementation. Public employees who were involved or complicit in past abuses have an interest in covering up those abuses and protecting their positions. Both actual government authority over the targeted institution and political will are necessary to implement a vetting process. The nature of the transition should be carefully analyzed, potential resistance to the vetting process should be considered in advance, and reform-minded constituencies who may assist in the design and implementation of a vetting process should be identified.

The level of political commitment will also influence the design of a vetting process. For example, a review of serving employees may result in their removal from positions of power, which is likely to raise significant political resistance. The softer option of merely screening new appointments, on the

other hand, is generally politically less controversial and requires a lower level of governmental authority or political will.

2. INSTITUTIONAL CONDITIONS:

WHAT ARE THE POSITIONS SUBJECT TO VETTING?

A clear definition of the positions subject to vetting is a prerequisite for any vetting process. At the end of a conflict, the public sector is generally in crisis. Frequently, the sector continues to operate within the organizational structures that perpetuated the conflict. The institutional context is often fragmented. Some institutions are not functioning, leaving a governance gap. Other institutions have overlapping mandates, leading to competing responsibilities and redundant capacities. The number of public employees is often inflated. The organizational structure of an institution is often distorted and does not meet the needs of a country governed by the rule of law. Commonly, an institution's personnel do not represent the population it is mandated to serve.

In such a context, the entire public sector may have to be changed in order to meet the needs of a country governed by the rule of law. Institutions might have to be merged or consolidated, reduced in size or enlarged, newly created or abolished. The personnel composition of an institution might have to be modified to reflect the composition of the population, and ex-combatants might have to be integrated. Public sector reforms and internal organizational changes determine the number of positions, affect the job requirements for individual positions, and limit the number of posts available for persons from each gender, ethnic and religious group, and geographic region. In most cases, organizational changes should be taken prior to establishing a vetting process if they affect positions that will be subject to vetting. Otherwise, individuals might be vetted for positions that are subsequently changed or eliminated, and the vetting process might have been superfluous or even counterproductive, which would undermine the credibility of the entire reform effort. In some instances, however, where the process of organizational change might be protracted or lengthy, some form of targeted vetting might have to precede organizational change, provided such vetting does not prejudice or compromise the underlying reform process. While public sector reform and internal organizational changes might represent conditions for a meaningful vetting process, they also constitute significant reform achievements in themselves. The Capacity and Integrity Framework (CIF) is a simple tool to assess institutional reform needs in post-conflict settings.²

The type of institution concerned will also affect the design of a vetting process. Vetting judges, for example, will have to give due consideration to the

independence of the judiciary and the separation of powers. Vetting processes for elected officials or candidates for elected office should be designed so as to minimize the risk of interference with the will of the electorate. Vetting security agencies usually elicits significant challenges concerning the processing of large numbers of employees.

3. INDIVIDUAL CONDITIONS:

WHO ARE THE PERSONS TO BE VETTED?

In addition to defining the positions that will be subject to vetting, the individuals to be vetted have to be identified. A post-conflict situation also raises significant and peculiar challenges in this regard. In many instances, membership in a public institution is not clearly defined and the number of personnel is unknown. In other instances, membership in an institution may not be accessible—such as in clandestine organizations operating within or at the behest of the state. Often, the boundaries of institutions are fluid and porous in countries emerging from conflict. If the target group of a vetting process—that is, the personnel of an institution or a specific group within an institution to be vetted—is not clearly known, it needs to be identified by means of a census or registration process, and informal access to and departure from the group of persons to be vetted have to cease. A failure to identify the target group prior to establishing a vetting process would allow circumventing it and might render the entire process obsolete. The identification of personnel, in particular in the security sector, often represents a relatively noncontentious start to a reform process and constitutes a significant reform achievement in itself. A personnel census will also provide reliable data on the shortcomings of the employees; assist in planning a realistic and viable vetting and personnel reform process; and might be used to establish a proper personnel management system for the institution in question.

Identification is not enough. Reliable records about the integrity of the persons to be vetted are a condition of any meaningful vetting process and need to be established. During periods of conflict, information about abuses is often covered up and evidence destroyed. Frequently, personnel files have not been established or have been improperly maintained, manipulated, or destroyed. Commonly, the police, prosecutors, and courts failed to investigate or prosecute abuses and indeed may have maintained a climate of impunity. Frequently, nongovernmental organizations monitoring and investigating human rights abuses have been suppressed.

A vetting process may be broadened beyond existing personnel to include external candidates. The pool of potential external candidates, as well as

their general competence and integrity, should be assessed and their availability determined in order to minimize the risks of governance gaps and to measure the time and resources needed to identify, prepare, and train replacements.

To collect reliable integrity data in the post-conflict period, background information might have to be collected proactively from a variety of sources. Sources of information include, among others, personnel files, court records, party files, election registers, United Nations reports, NGO reports, truth commission reports, media reports, and independent investigation reports. Providing the public with an opportunity to come forward with information is another useful avenue to collect information on the integrity of serving public employees and external candidates. Provided the security situation permits, lists with the names of employees and candidates could be broadly publicized and a contact point could be established to receive information on the background of employees and candidates.

4. LEGAL CONDITIONS: WHAT IS THE VETTING MANDATE?

A firm legal basis will significantly facilitate the establishment of a vetting process. Any vetting process will be contested and create some political resistance. An explicit commitment to vetting in a peace agreement or a Security Council resolution will be more difficult to circumvent. Peace negotiators should encourage the inclusion of specific vetting provisions in peace agreements in order to place a clear obligation on the parties. If special domestic legislation is required, it should be clear, precise, and in compliance with constitutional requirements and international standards.

5. OPERATIONAL CONDITIONS: ARE THE RESOURCES ADEQUATE?

The success or failure of vetting processes significantly depends on a thorough evaluation of operational needs and the provision of adequate time and resources. Capacities are generally limited and resources scarce in a society emerging from conflict. Various reform projects compete for scarce resources and the requirements of vetting processes are generally underestimated. Vetting processes are complex, time-consuming, and resource-intensive exercises requiring multidisciplinary skills, in particular when they concern institutions with large numbers of employees. International support to a post-conflict vetting process will often be a condition for its successful implementation (on the role of international actors in the vetting process itself, see below IV.D).

6. TEMPORAL CONDITIONS: HOW IS THE TIMING?

Post-conflict contexts are determined by various and often conflicting agendas and timetables, and vetting may compete with other transitional processes. A political transition may, for example, rely on individuals who could be affected by a vetting process; an election could benefit from or be restricted by a vetting process; or the findings of a truth-seeking exercise might feed into a vetting process. The timing of a vetting process raises complex questions of sequencing and interrelations with other transitional processes, and has to be adapted to the political developments. The timing will also condition strategic design choices such as the institution or group targeted by vetting (see below IV.B), the type of mechanism selected (see below III), or the composition of a vetting commission (see below IV.D).

B. AVOID UNDESIRABLE CONSEQUENCES

1. POLITICAL MISUSE

A vetting process can be misused for partisan political purposes. For example, vetting of judges could be used to undermine the independence of the judiciary. Removals can be based on group or party affiliation, rather than on individual conduct, target political opponents, and degenerate into political purges. Such processes undermine, rather than reinforce, human rights and the rule of law, create resentment among those affected by the process, and are unlikely to achieve the necessary reform goals. International human rights standards have to be respected in the implementation of a vetting process itself in order to avoid its political misuse (see below IV.E).

2. GOVERNANCE GAP

The public service needs in the post-conflict period have to be considered. Vetting, by removing larger numbers of public employees (in particular senior or expert), may disrupt the functioning of public service and create a governance gap. In the interim, imperfect public service is usually preferable to no service at all. Interim arrangements with existing institutions might have to be put in place, a vetting process might have to be implemented in phases, and replacements might have to be identified proactively in order to avoid a governance gap.

3. DESTABILIZATION

Removed public employees who do not find alternative employment and are not integrated into society may drift into criminality and destabilize a

sensitive political balance. In particular a large number of removed security personnel may turn to armed opposition or organized crime and create a security threat. The potential destabilizing effects of removals should be assessed prior to designing a vetting process, and options to provide severance pay and other temporary assistance should be explored. Vetting processes may also be linked with disarmament, demobilization, and reintegration programs (DDR). However, care should be taken to consider the rights of victims, and assistance to removed employees has to be balanced with the needs of victims.

III. TYPES OF VETTING

The type and scope of a vetting process can vary considerably. This section describes different ways of vetting in post-conflict settings. These types are neither exhaustive nor necessarily exclusive.

A. VET ALL OR VET CERTAIN POSITIONS

A vetting process can target all positions or only certain positions of a public institution or a certain category of positions across institutions. In general, a vetting process that targets all positions might be desirable to ensure that all employees and candidates meet minimum standards of integrity. For operational reasons, a general vetting process might, however, not be feasible, in particular when the institution in question has a large number of personnel. In such a context, a vetting process might prioritize senior managers. Such a process requires fewer resources and can be implemented more quickly than a vetting of all personnel. Improving the quality of senior managers is likely to have a catalyzing effect because their authority provides them with significant leverage over the entire reform process and because it sends a clear message that the reform will move forward. Once the managers of a public institution meet minimum standards of integrity, the normal internal discipline and appointment mechanisms might be able to address the integrity deficits of the regular employees. Vetting senior managers is, however, likely to meet significant resistance because it affects positions of power and requires considerable political will for its implementation.

Rather than prioritizing senior managers, a vetting process could also target the personnel of a specific unit that has a well-known history of human rights abuse or professional misconduct. The personnel of these units might constitute a liability to the reform process. A failure to exclude persons with

serious integrity deficits undermines the trustworthiness of the entire public institution and might contravene international law (see below IV.C).

B. REVIEW OR REAPPOINT SERVING EMPLOYEES

In a review process, a special mechanism is established to screen serving public employees with the aim of removing those who are unfit to hold office. Basic due process standards apply, the burden of proof falls on the reviewing body, and balance of probabilities will be the appropriate standard of proof. A review process should generally be established when regular discipline and appointment mechanisms would be overwhelmed or unavailable, and when broader personnel reforms are not necessary.

In a reappointment process, on the other hand, the public institution is first disbanded, a successor institution is established, and there is a general competition for all posts with the aim to select the most suitable. All serving employees have to reapply if they want to continue working and external candidates can also apply. To avoid a governance gap, the serving employees may remain in office until such time as a final decision is made about their future employment status. A reappointment process turns all employees into applicants and shifts the burden of proof to the applicant, who has to establish that he or she is the most suitable for the post. Applicants in a reappointment process do not enjoy the due process protections of serving employees in a review process, as there is no right to be appointed to public office. Applicants have, however, a right to equal access to public service. These procedural simplifications streamline the vetting process significantly. A reappointment process also offers a better opportunity to undertake fundamental personnel reforms (such as modifying the gender or ethnic balance, and downsizing or merging institutions).

A reappointment process represents, however, several serious risks. Reappointment could enable political interference by the executive branch of government in otherwise independently operating sectors, undermine basic due process rights, and leave a governance gap while the process is ongoing. It might also require a large number of qualified replacements. A reappointment process should therefore be limited to circumstances when the institution is fundamentally dysfunctional or compromised, and needs to be changed significantly. The process should be carried out as quickly and as early as the circumstances permit in order to avoid protracted periods of legal uncertainty.

C. VET SERVING EMPLOYEES OR EXTERNAL CANDIDATES

Rather than vetting serving public employees, a vetting process could be limited to new appointments, including transfers and promotions, and only screen candidates for positions that are or become vacant. The political stakes are lower in vetting processes for candidates for new appointments, which regulate access to public posts, rather than in vetting processes of serving public employees that will result in the removal from positions of power of those who are unfit to hold office. Limiting a vetting process to new appointments, transfers, or promotions is generally less intrusive, politically less controversial, and can constitute an important long-term measure to professionalize the public institution.

This softer option of vetting does not, however, ensure the removal of serving public employees with serious integrity deficits, significantly slows down the renewal of personnel, and is unsuitable for fundamental reforms of the institutional framework. Yet vetting candidates for new appointment, transfer, or promotion might constitute the first phase of a vetting process that is later expanded to vetting serving employees when the political circumstances are more opportune.

D. A SPECIAL OR A REGULAR MECHANISM

In general, a special, ad hoc commission has to be established to implement a vetting process (see below IV.D). In certain instances, it may also be possible to use regular procedures to remove public employees with serious integrity deficits. Unlike any special process, regular procedures do not infringe on the certainty of the law and are less costly and disruptive. Regular procedures could take the form of either internal disciplinary mechanisms or of executive decisions when the positions concerned are political appointments.

Regular disciplinary procedures can be used when the percentage of individuals affected by the vetting process is small; when the institution remains functional and there is no urgent need for wider reform; and when there is sufficiently strong political will to implement self-reform. However, the challenges of a post-conflict context generally overstrain regular disciplinary procedures, and the capacity and will of public institutions to self-reform are particularly limited in those situations.

Appointments by executive order are reversible informally without due process concerns and removals by executive order provide an opportunity for quick personnel changes. Executive decisions are, however, more open to abuse and the lack of formality may lead to perceptions of bias. Replacing

political appointees by executive order is generally also highly contested in a post-conflict context, especially where delicate peace processes have resulted in power-sharing relationships. The establishment of a more formal vetting process to accompany executive appointment and removal processes should be considered.

IV. HOW IS A VETTING PROCESS DESIGNED?

This section suggests several steps to design a vetting process. While this approach will not answer all questions that arise in the development of a vetting process, following these steps will help in designing vetting processes that respect both specific contextual needs and international standards. The assessment of the conditions of the process and of the risks of undesirable consequences (see above II) should inform the entire design of a vetting process.

A. INFORM AND CONSULT THE PUBLIC

To reestablish civic trust and relegitimize public institutions, the public needs to be aware of and trust the reform process itself. Transparency about the vetting process and consultation about its objectives will help in building confidence in the process, in reducing uncertainty experienced by the personnel subject to the process, and in ensuring that it effectively responds to the actual needs of victims and society in general. There is no “one-size-fits-all” response to vetting and public consultations help in designing context- and institution-specific vetting strategies. Public awareness can also help in preempting later efforts to cast doubts on the validity of the process. Not only should a vetting process, therefore, include a public information mechanism but the design of the process itself should be informed by broad consultations with civil society, in particular with victim groups and other reform-minded constituencies. Opportunities should be provided to victims of abuses and civil society organizations to provide background information about public employees and candidates, as part of the data collection process on which to base vetting decisions.

B. ESTABLISH VETTING PRIORITIES AND SELECT VETTING TYPE

In a post-conflict context, the entire public administration might benefit from a vetting process. Vetting processes should, however, prioritize the military,

the civilian security sector, intelligence services, the judiciary, and other institutions that underpin the rule of law. In general, these institutions were involved in the most serious abuses in the past. At the same time, they have primary responsibility for maintaining stability and security, and for protecting basic human rights. Reforming these institutions creates important conditions for an effective and expeditious transition to peace and the rule of law.

On the basis of an assessment of the basic factors that determine the design of a vetting process (see above II), the most appropriate type of vetting process for the institution in question (see above III) should be selected.

C. DEFINE VETTING CRITERIA AND OUTCOMES

The integrity of a public employee or a candidate for public employment refers to the person's adherence to international standards of human rights and professional conduct, including a person's financial propriety. The precise kind and scope of integrity required for public employment depend on the circumstances of the particular post-conflict context, as well as on the requirements of the specific position. Criteria should be based on a thorough assessment of what is required and realistic in the particular situation, with the aim of establishing fair and efficient public institutions. For example, a very high integrity standard may result in the exclusion of an unacceptably large number of employees. Or an integrity standard that is difficult to verify is unlikely to be usable in practice. A number of international codes and guidelines provide standards and indicators that may assist in the development of integrity standards for post-conflict vetting.

But to be efficient, effective, and credible, a vetting process should not be disconnected from broader personnel reform measures that are needed in the post-conflict situation. More often than not, integrity deficits are not the only shortcomings of public employees in post-conflict contexts, and the exclusion of persons who lack integrity may not bring about the necessary personnel changes. The employees of a public institution may, for example, not only include human rights abusers, but also lack qualifications and skills, and the personnel as a whole may fail to represent the population it is called to serve. A vetting process may, therefore, also include criteria of individual capacity (professional competence, physical aptitude, etc.) and of representation (gender, ethnicity, geographic origin, etc.).

Criteria may compete with each other and the design of a comprehensive personnel reform program may require difficult trade-offs between differ-

ent reform objectives. Generally, the legitimacy and effectiveness of personnel reform will depend on attaining minimum standards in each of the three categories of integrity, capacity, and representation. However, as a general rule, involvement in gross violations of human rights or serious crimes under international law should always disqualify a person from public employment. These include in particular genocide, war crimes, crimes against humanity, extrajudicial execution, torture and similar cruel, inhuman, and degrading treatment, enforced disappearance, and slavery. These are serious crimes that indicate a lack of integrity at a level that fundamentally affects a person's credibility to hold public service. If a person were convicted and punished for such crimes — and, in fact, states have an obligation to prosecute these crimes — exclusion from public service would be a normal consequence.

Substantive criteria (integrity, competence, and representation) may be complemented by formal criteria such as compliance with the vetting process, appearance at the announced interview time, full completion of the registration and vetting forms, submission of required documents such as birth or school certificates, and appearance on a personnel list. Such formal criteria take on increasing significance in processes where reliable information on the background of the persons to be vetted is limited. Individuals with significant integrity deficits are often reluctant to subject themselves to the scrutiny of a screening process and may, therefore, exclude themselves from the formal requirements of a vetting process.

The outcomes of a vetting process for public employees who do not meet the minimum criteria for continued employment should depend on the reasons for removal as well as the specific context. An employee with integrity deficits could be disqualified from a certain category of posts, from all posts in an institution, or from public service in general. The disqualification could be permanent or temporary, and reintegration could depend on the fulfillment of certain conditions, for example, the acknowledgement of or compensation for certain acts of misconduct. The employee could also be reassigned, put on probation, demoted, or barred from promotion. While employees who were involved in gross violations of human rights or serious crimes under international law should be banned from public employment, the determination of appropriate outcomes depends largely on the specific circumstances of the post-conflict context.

If an employee is removed for lack of professional competence, the employee could apply for another position or reapply for the same position as soon as she or he has acquired the missing skills. If an employee is removed

only as a result of changes to the composition of personnel, the employee could immediately apply for another public post. While rewarding abusers should be avoided, care should also be taken to prevent, or at least alleviate, the detrimental effects removals might have on employees who are removed for reasons other than integrity deficits. The personnel reform process might, for example, foresee the provision of alternative employment, severance pay, reintegration assistance, or the provision of retraining.

D. DEVELOP THE MECHANISM

Generally, regular discipline mechanisms are inadequate to conduct a vetting process in a post-conflict context and a special, ad hoc commission has to be established (see above III.D). This commission should be independent to ensure an impartial and legitimate implementation of the process. Establishing an independent commission may not be an easy task in a country emerging from conflict. The members of the commission should be distinguished and broadly respected individuals who are not associated with a former warring faction. Broad consultations should precede the appointment of the members by a high and independent authority, such as the constitutional court, the head of state, or an international institution. The senior members should be appointed for the duration of the personnel reform process and should not be removable during this period.

The ad hoc commission will need a well-staffed secretariat to prepare the necessary information and support the decision-making process. The staff of the secretariat should be multidisciplinary and include project managers, information system managers, lawyers, and technical experts. The commission and its secretariat should also be given adequate financial and material resources. Given the scarcity of resources in a post-conflict situation and the importance of an effective and fair vetting process, international support to establish and run an ad hoc commission will often be necessary.

The ad hoc commission is likely to make unpopular decisions that could lead to risks for its members; arrangements need to be put in place to provide security for them.

Domestic ownership, where possible, is preferable to internationalized processes, as it contributes to the legitimacy of the process, ensures the application of local know-how, and provides a better basis for domestic buy-in and sustainability. Vetting will, however, inevitably meet resistance, in particular when representatives of former warring factions continue to wield authority in the post-conflict period. Strong international support, both political and

operational, will often be critical. The inclusion of international members may be considered to increase the independence and legitimacy of the ad hoc commission.

In some instances, international leadership may be unavoidable. In an internationally-led process, every effort should be made to involve domestic actors as broadly as possible, ensure incorporation into domestic law, and make provision for a seamless changeover from the ad hoc vetting process to regular domestic recruitment and disciplinary procedures.

E. RESPECT INTERNATIONAL PROCEDURAL STANDARDS

Vetting processes that fail to respect international standards may undermine, rather than reinforce human rights and the rule of law and are unlikely to build civic trust. International standards require, in particular, that vetting processes are based on assessments of individual conduct, rather than on membership of a group or institution. Purges and other large-scale exclusions on the sole basis of group affiliation not only violate international standards but also tend to cast the net too wide and to exclude persons of integrity who bear no individual responsibility for past abuses. At the same time, group exclusions may also be too narrow and overlook individuals who committed abuses but were not members of the group. Such collective processes are unlikely to achieve the intended reform goals, may exclude employees whose expertise is needed in the post-conflict period, and may create a pool of discontented persons that might undermine the transition.

What specific rights apply in the vetting process itself depends on the type of process used. In a review process, minimum due process standards required in administrative proceedings should be respected:³ initiation of proceedings within a reasonable time and generally in public; notification of the parties under investigation of the proceedings and the case against them; an opportunity for the parties to prepare a defense, including access to relevant data; an opportunity for them to present arguments and evidence, and to respond to opposing arguments and evidence, before the vetting body; the opportunity of being represented by counsel; notification of the parties of the decision and the reasons for the decision; and the right to appeal to a court or other independent body. An exception to this is that employees who were unlawfully appointed, in violation of procedural or qualification requirements, can be removed without any need to establish other reasons for their removal.

A balance of probabilities standard will generally be appropriate in a review process and the burden of proof falls generally on the vetting body.

Under exceptional circumstances, the burden may be reversed when the group or unit the employee belonged to during the conflict has a well-known history of human rights abuse. In such instances, the employee would have to prove noninvolvement in the abuse.

The procedural status of a candidate in a reappointment process is different. Access to public employment as such is not a right, and a candidate who challenges the fact that she or he has not been selected does not enjoy the due process protections that are granted to an employee who is removed from public service. Reappointment processes are, therefore, procedurally less complex than review processes. A candidate for public employment has, however, a right to “access, on general terms of equality, to public service.”⁴ Access to public service should, therefore, be based on criteria of equality, and the selection process should ensure equal application conditions and nondiscriminatory procedures.

Special international and constitutional protections safeguard the independence of the judiciary including the separation of powers, guaranteed tenure of judges, inability to be removed by executive order, prohibition of interference with the judicial process, and so forth. Particular care has to be taken to protect the independence of judges both in the process by which judges are vetted and in formulating the criteria according to which they are reviewed. In general, the vetting of judges should be carried out by their peers, through a regular or ad hoc judicial review commission.

Appointments by executive order are reversible without due process concerns. A political appointee who is removed by executive order has generally no right to a hearing or judicial review.

V. WHAT OTHER INSTITUTIONAL REFORMS ARE NECESSARY?

A comprehensive approach to institutional reform is critical to ensure its effectiveness and sustainability. More often than not, the shortcomings of a public institution in a post-conflict situation are multifaceted and represent complex and interrelated causes of malfunctioning and abuses. Generally, vetting and personnel reform are important but insufficient reform measures and need to be accompanied by broader institutional reforms to safeguard the results of the vetting process and to ensure the quality of public personnel in the future. These include, in particular, measures to remove political interference in and partisan control from public institutions, and to establish operational independence and public accountability. While a detailed discus-

sion of these measures goes beyond the scope of these guidelines, key reform measures include the following:

- Terminate inappropriate interference by informal authorities such as warlords, ethnic groups, clans, or paramilitary groups;
- Initiate institutional culture change, including appropriate modifications in training methodology and content;
- Change symbols that are associated with abusive practices (e.g., uniforms, insignia, flags);
- Create a sense of identification of employees with their public institution. Allow, for example, employee participation in the choices defining the institution (values, motto, symbols, etc.), or offer extrainstitutional incentives and services such as schooling and housing;
- Establish effective civilian oversight (constitutional, parliamentary, ministerial, public, community-level, ombudsperson);
- Provide effective redress for misconduct (internal disciplinary and public complaint procedures);
- Reform appointment procedures (merit based, ensure effective representation of particular groups, ensure due process, create professional career path, limit appointment powers of the executive branch of government);
- Ensure the separation of powers, build in particular the independence of the judiciary and the operational independence of other public institutions (e.g., the police and the prosecutor's offices); and
- Establish effective representation of public employees (professional associations).

VI. SOURCES OF ADDITIONAL INFORMATION

There is limited information available on vetting. Within the UN system, the Department for Peacekeeping Operations (DPKO), in particular its Civilian Police Division, and the Office of the High Commissioner for Human Rights (OHCHR) have been involved in vetting processes. The International Center for Transitional Justice (ICTJ) is acting as consultant on vetting to the UN in several countries (for contacts, see <http://www.ictj.org>). UN documents with useful general references to vetting include:

- *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. Report of the Secretary-General, August 23, 2004, UN doc. S/2004/616.

- Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity, and Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, February 8, 2005, UN doc. E/CN.4/2005/102.Add.1.

NOTES

- 1 These guidelines were produced by the International Center for Transitional Justice (ICTJ) in collaboration with the United Nations Development Programme (UNDP) and with the financial support of the UNDP. A similar version of these guidelines has been published by the UNDP and is available at http://www.undp.org/bcpr/documents/jssr/trans_justice/Vetting_Public_Employees_in_Post-Conflict_Settings.pdf. A similar version has also been published by the Office of the UN High Commissioner for Human Rights (OHCHR) as *Rule-of-Law Tools for Post-Conflict States — Vetting: An Operational Framework* (New York and Geneva: OHCHR, 2006).
- 2 For a full explanation of the CIF, see Annex 2 of the UNDP's version of the guidelines.
- 3 Article 14 of the International Covenant on Civil and Political Rights.
- 4 Article 25 of the International Covenant on Civil and Political Rights.



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COUNTRIES EMERGING FROM ARMED CONFLICT OR AUTHORITARIAN RULE face difficult questions about what to do with public employees who perpetrated past human rights abuses and the institutional structures that allowed such abuses to happen. *Justice as Prevention: Vetting Public Employees in Transitional Societies*, edited by Alexander Mayer-Rieckh and Pablo de Greiff, examines the transitional reform known as “vetting” —the process by which abusive or corrupt employees are excluded from public office. More than a means of punishing individuals, vetting represents an important transitional justice measure aimed at reforming institutions and preventing the recurrence of abuses.

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“This penetrating and timely collection of studies contributes much to our understanding of the role vetting plays in pursuit of the rule of law in post-conflict settings. It skillfully articulates how vetting is at the heart of ensuring public confidence in police and other law enforcement agencies in transitional societies. *Justice as Prevention* is a great contribution to the growing discipline of post-conflict institutional reform.”

— MARK A. KROEKER, Police Adviser and Director of the Police Division, United Nations Department of Peacekeeping Operations

ALEXANDER MAYER-RIECKH manages the ICTJ's security system reform program. He was chief of the Human Rights Office of the UN Mission in Bosnia and Herzegovina, worked for the UN in Rwanda, Ethiopia and Eritrea, and Timor Leste, and has published on post-conflict institutional reform and peacebuilding.

PABLO DE GREIFF is director of research at the ICTJ. Formerly associate professor of philosophy at SUNY Buffalo and Laurance S. Rockefeller Fellow at the Center for Human Values, Princeton University, he is the editor of seven books, most recently *The Handbook of Reparations* (Oxford University Press, 2006).

ISBN-13: 978-0-9790772-1-0

ISBN-10: 0-9790772-1-4



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